S. Hrg. 99-616, Pt. 2

REAUTHORIZATION OF THE PRICE-ANDERSON ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON NUCLEAR REGULATION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 445, S. 1225, and S. 1761

BILLS TO AMEND THE PRICE-ANDERSON ACT

PART 2

MAY 13, 1986

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE
62-404 O
WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S321-32

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ROBERT T. STAFFORD, Vermont, *Chairman*

JOHN H. CHAFEE, Rhode Island
ALAN K. SIMPSON, Wyoming
JAMES ABDNOR, South Dakota
STEVE SYMMS, Idaho
GORDON J. HUMPHREY, New Hampshire
PETE V. DOMENICI, New Mexico
DAVE DURENBERGER, Minnesota

LLOYD BENTSEN, Texas
QUENTIN N. BURDICK, North Dakota
GARY HART, Colorado
DANIEL PATRICK MOYNIHAN, New York
GEORGE J. MITCHELL, Maine
MAX BAUCUS, Montana
FRANK R. LAUTENBERG, New Jersey

BAILEY GUARD, *Staff Director*
LEE O. FULLER, *Minority Staff Director*

SUBCOMMITTEE ON NUCLEAR REGULATION

ALAN K. SIMPSON, Wyoming, *Chairman*

PETE V. DOMENICI, New Mexico
STEVE SYMMS, Idaho

GARY HART, Colorado
DANIEL PATRICK MOYNIHAN, New York

CONTENTS

OPENING STATEMENTS

Page

Simpson, Hon. Alan K., U.S. Senator from the State of Wyoming 2
Stafford, Hon. Robert T., U.S. Senator from the State of Vermont 1

WITNESSES

Berger, David, Berger & Montague 5
  Written statement 94
  Responses to additional questions from:
    Senator Simpson 109
    Senator Stafford 118
  Article by 122
Fineberg, Kenneth R., Kaye, Scholer, Fierman, Hays, & Handler 8
  Written statement 151
  Responses to additional questions from:
    Senator Stafford 162
    Senator Simpson 167
Hall, Kenneth C., manager-insurance, General Electric Co 10
  Written statement 172
  Responses to additional questions 193
Harkins, John G., Jr., Pepper, Hamilton, & Scheetz 4
  Written statement 47
  Responses to additional questions from:
    Senator Stafford 87
    Senator Simpson 72
Hunter, J. Robert, president, National Insurance Consumer Organization 32
  Written statement 254
  Responses to additional questions 262
Kennedy, William F., Hunton & Williams 7
  Written statement 123
  Responses to additional questions 141
Schmalz, Richard A., Counsel, American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters, accompanied by Michael J. O'Connell, manager, Mutual Atomic Energy Reinsurance pool 31
  Written statement 210
  Responses to additional questions from:
    Senator Stafford 221, 235
    Senator Simpson 218, 245
    Senator Domenici 227
  Letter to Senator Simpson 231

ADDITIONAL MATERIAL

Letters:

  Marrone, Joseph, president, American Nuclear Insurers, to Senator Stafford 252
  Vaughan, James W., Jr., Acting Assistant Secretary for Nuclear Energy, Department of Energy, to Senator Simpson 266

Statements:

  New Jersey Department of Energy 268
  Vermont House of Representatives 277

REAUTHORIZATION OF THE PRICE-ANDERSON ACT

TUESDAY, MAY 13, 1986

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON NUCLEAR REGULATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:55 a.m., in room SD-406, Dirksen Senate Office Building, Hon. Alan K. Simpson (chairman of the subcommittee) presiding.

Present: Senators Simpson, Stafford, Domenici, and Mitchell.

STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Good morning, ladies and gentlemen.

Senator Simpson will be here momentarily. He is on the road from the White House to this meeting at the present time, and rather than hold things up until he can get here, since I am the chairman of the parent committee, I will deliver my opening statement, and then wait for Senator Simpson to be here.

Without objection, I see no one here to object, I will provide that Senator Simpson's opening remarks will precede my own in the hearing record.

The purpose of this hearing is to examine the effects of the proposed amendments to the Price-Anderson Act on the availability compensation for victims of a nuclear accident, and on the availability of insurance for nuclear activities.

The hearing is one aspect of the broad issue of finding the best way to provide compensation for victims of possible nuclear accidents. It is this Senator's belief that providing full compensation to the victims of an accident is an essential feature of any Price-Anderson bill.

In my view, the costs of an accident should be borne by the person or persons causing the accident, and the beneficiaries of the activities creating the risks of the accident, not by the victims.

As most of you here know, I have introduced a bill, S. 1761, that reflects my judgment of one good way to provide compensation to victims of an accident. Other proposals provide alternative compensation methods. In all cases, there appears to be agreement that victims should be fully compensated for losses.

I believe that it is correct that all the bills pending before this committee are intended to provide full compensation to victims of a nuclear accident. It is important to remember this basic goal as we examine, at this hearing, the pros and cons of the various means to achieve that goal.

With respect to the committee's schedule for Price- Anderson legislation, I would like to note that the Energy Committee recently reported S. 1225, the Price-Anderson amendments of 1986. Under the referral agreement, this committee now has 120 calendar days from the date that the Energy Committee reported in which to report S. 1225, or be discharged. Thus, we need to report a Price-Anderson bill prior to the beginning of the August recess. I mention this now in order to join Senator Simpson in making sure that the members of the committee are aware of the relatively short timetable for producing legislation.

I hope members will be ready to markup the bill soon after we return from the Fourth of July recess.

I see now that the chairman of the subcommittee has arrived in the nick of time, as they usually do in Wyoming. He will not have to listen to the opening statement of the Senator from Vermont.

I provided in the record, Mr. Chairman, that your opening statement will precede my own in the record of this hearing.

Senator SIMPSON. Mr. Chairman, you are always most gracious with me in my role as chairman of this subcommittee in the full committee which you chair so ably, and I appreciate the support that you have given me. It has been critical on these various nuclear regulation issues, without it, it wouldn't be any fun at all, I can tell you that.

You have been very patient with me. I get a bit rambunctious, and you have great Vermont patience, which is very appreciated by this Senator.

Senator STAFFORD. Mr. Chairman, we are always patient with people who are bigger and quicker than we are.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Mr. Chairman, I should just like to say, good morning to all of you.

When I was in the minority, some Senator would rush in and say that he had been at the White House, and I knew they were kidding when they would do that. Now that I have this awesome new power as assistant majority leader, or also whip, that is where we were.

The old man is home, I can tell you, and he was raising cane with us all this morning in his superb way, so I was tardy.

Mr. Chairman, you have outlined the time problem we have, and indeed we do. We are going to continue our hearings on reauthorization. I thank the witnesses for their participation and I apologize for the last minute change in schedule. We will accommodate you all today, and your flexibility is deeply appreciated.

We have three bills dealing with the reauthorization of Price-Anderson currently pending before the subcommittee—Senator Hart's bill, S. 445, S. 1225 introduced by Senator McClure and myself, and Senator Stafford's bill, S. 1761. These various proposals strive in really three fundamentally different ways to deal with the consequences of a nuclear accident in what is an efficient, equitable, reliable and comprehensive way.

Given those objectives, there are two major issues that we will want to get at today in our hearings. The first one, what impact will any changes in the channeling features of the Price-Anderson Act, under which all financial responsibility is channeled to the utility suffering the accident, have on the settlement, adjudication, and payment of the claims following an accident. Specifically, will proposals to allow subrogation and to exclude the payment of punitive damages from Price-Anderson coverage result in increased transaction costs, multiparty litigation, or delay in the payment of claims following an accident.

Second, what impact, if any, will changes in the Price-Anderson have on the availability and affordability of nuclear liability insurance?

Having carefully examined all the bills on the table, and the Nuclear Regulatory Commission's report to Congress, there are more than several questions we need to discuss concerning the insurance related aspects of the act, not only on the mechanics, but on the policies that underline those proposals. Questions of liability can often prove to be not only complex to resolve, but also highly controversial and, indeed, emotional.

Accordingly, I must say, I approach all of this with a degree of reluctance as to any fundamental changes in a system that has worked, by and large, just as it was intended.

On the other hand, I do think that improvements can be made in Price-Anderson to make it function more effectively, if those can be accomplished without distorting the originally crafted careful balance that was struck when the act was enacted, and with an eye toward the equities of both the accident victims and those required to contribute to paying the public liability claims. I think that we might have made some considerable progress, and we might well succeed in moving the reauthorization bill forward in this Congress. That is my fond hope in the exercise.

Mr. Chairman, do you have anything further that you wish to add?

Senator **Stafford**. No, I do not, thank you, Mr. Chairman. I have made my opening statement, and I am prepared to hear the witnesses.

Senator **Simpson**. We will do that. If we could have now those witnesses, John G. Harkins, Jr., of Pepper, Hamilton & Scheetz of Philadelphia, PA; David Berger of Berger & Montague of Philadelphia, PA; William F. Kennedy of Hunton & Williams of Easton, CT; Kenneth R. Feinberg of Kaye, Scholer, Fierman, Hays & Handler; and Kennth C. Hall, manager-insurance, General Electric Co. in New York, NY.

It is a pleasure to have you here. Some I have come to know in my years here. Ken Feinberg was on the Judiciary Committee staff when I was there as a freshman member. He is an exceedingly capable and extraordinarily bright man. It is good to see you all. We would be interested very much in what you have to share with us.

I know that the staff has advised you of the time restraints, and then we will have time for questions on this portion of the panel.

Mr. Harkins, please proceed.

STATEMENT OF JOHN G. HARKINS, JR., PEPPER, HAMILTON & SCHEETZ

Mr. HARKINS. Thank you, Mr. Chairman, and members of the staff. Thank you very much for this opportunity to share with you some of the experiences from the first major attempt to implement the Price-Anderson Act, namely, the Three Mile Island litigation that has been in progress since 1979.

I have submitted to you a background of what has happened in that Three Mile Island litigation in written form. I would like to, then, go beyond that background, if I may, and give you some very strong impressions about how the act has worked in practice, some of the problems, and some of the possible solutions.

First of all, I think that it was recognized right at the beginning that the most important aspect of the act, from the standpoint of attempting to carry forward its purpose in the event of an accident, namely, the Three Mile Island accident, was the omnibus insurance provision. Through that provision, the American Nuclear Insurers were able to retain one law firm, were able to avoid all of the warfare that normally goes on among defendants in a mass tort situation, and were able to channel their energies and decisionmaking toward resolving problems of compensation.

That, of course, led me, with Mr. Berger, into a series of discussions, the effect of which was to settle some important parts of the compensation issues relatively early in the Three Mile Island history, principally the economic harm claims, those who suffered wage losses, evacuation losses, and those who suffered business interruption losses and the like.

We had a major shift in the Three Mile Island litigation. Your notes will show you the names of the cases, and I am not going to try to cite cases to you here. But the Third Circuit Court of Appeals found that contrary to the district judge's view, Federal question jurisdiction did not lie in the Federal District Court in Harrisburg.

The effect of that decision by the third circuit was to send the litigation, in effect, back to the State court systems and, as it has gradually evolved, into other State court systems, and other Federal courts as well. I will come back to that point in a moment.

The great procedural advantage that we enjoyed in the early phase of the Three Mile Island litigation, which enabled us to use rule 23, the class action rule, to use rule 16, the pretrial order rule, to use other devices, with which Mr. Berger is quite familiar, and to which he will address himself, was lost when we were cast back into multiple fora. That has resulted in a series of interim steps that we have taken to attempt to recoordinate the Three Mile Island litigation. I think that we have done so with some success, but the effect has been to disrupt what was a fairly efficient process.

I would like to turn immediately to the question of efficiencies and the avoidance of transactional costs, because I have only a limited time, and I know that you want to hear from others.

The omnibus insurance provision was clearly a benefit in terms of minimizing transactional costs. It has had the effect which I described in my written presentation, the effect of having, as it was, at least for quite a while, one judge familiar with all of the litigation, able to rule intelligently, and based on experience and knowledge gained in the pretrial stages, was a real advantage, improved remarkably the process by which cases were moved toward disposition.

Jurisdiction is, therefore, a key question in terms of transactional efficiency.

Third, for a great period of time, we were not bothered with punitive damage claims in a real sense. There were punitive damage claims made, but they were not being pressed.

More recently, in what I would call a new stage of Three Mile Island litigation, punitive damage claims have become a principal part of the complaints of each of the plaintiffs, and we now have pending some 2,000 personal injury claims, all of which have a punitive damage claim attached to the complaint.

If punitive damages are a part of what is a compensation system, and those two are not, obviously, definitionally compatible, but if someone thinks that punitive damages are a part of the compensation system, you then reintroduce into the process all of the internecine warfare that goes on in most tort litigation, because no defendant can then rely on the omnibus insurance provision. No defendant, so long as this is outside of the system, or may expose defendants to later litigation even within the system, no defendant can afford to go forward on a faultless kind of stipulation, or a fault-free stipulation as we did in the Three Mile Island litigation, where we simply said, you didn't have to prove fault, you could go right to the issues, causation, and damages. We wouldn't bother with proof of fault.

With that kind of a new punitive damage dimension of this litigation, all of those efficiencies will be lost.

I see my time is up. I would like to offer other observations on the Three Mile Island litigation in response to questions, but I will defer to my colleagues on the right.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you very much.

Now Mr. Berger.

STATEMENT OF DAVID BERGER, BERGER & MONTAGUE

Mr. BERGER. Thank you, Mr. Chairman.

I really appreciate this opportunity to be heard. I brought suit and was chief counsel for the victims of economic harm in the Three Mile Island litigation. We had some 100,000 households that were affected, of which 40,000 requested claim forms, and over 15,000 claims were filed, almost 12,000 of which consisted of evacuation and wage-loss claims. The remaining 3,000 claims were claims for interruptions of business and were very much larger and much more complex.

I agree with my distinguished colleague, Mr. Harkins, that when I started this case as a class action, I assumed, as he did, that the Federal court had jurisdiction. It turns out, after we had settled the case, having employed rule 23, rule 16, and the other provisions of Federal law, the court of appeals, rather unexpectedly, in 1984, in the *Stibitz* case, held that there was no jurisdiction.

So my first point is to say, with absolute certainty, along with Mr. Harkins, I agree, and I hope that Congress will make clear that the Federal courts have jurisdiction. However, I go beyond Mr. Harkins' suggestion. Based upon my experience in mass tort litigation—I am chief counsel for the primary and secondary schools of the Nation, which are seeking reimbursement for damage caused by asbestos—and based on that experience and other experiences I have had in mass tort litigation, I am convinced that the judicial system of the United States is now facing a very serious crisis.

There is a way in which, so far as this particular problem is concerned, Congress can do something which will not only be important in terms of Price-Anderson, but which will show the way to judges, lawyers, and litigants how to avoid that morass.

First, there should be Federal jurisdiction. Second, that jurisdiction, so far as Price-Anderson is concerned, that is to compensate victims from nuclear accidents should be exclusively lodged in the Federal courts. The third point is that the Federal court should be empowered to certify a mandatory, all-inclusive class pursuant to the provisions of rule 23. This would mean, just as Mr. Harkins and I were able, through an accident of fate, I think, to have Three Mile Island settled in a comparatively short period of time in one court, which would be impossible without congressional action, if this committee would react favorably to what I am suggesting, it would be possible to go before a single Federal court, get all the claims concentrated there, not only those for economic harm, but also those for personal injuries. It would be a mandatory class.

I have also made a suggestion in my written testimony that the Federal judge in charge should require the lead counsel for the claimants to submit a settlement plan, and that settlement plan would include, among other things, a claims handling facility, that would be properly staffed. It would be for the purpose of hearing and determining all the claims that come down the pike. There would be strict liability, and the only question, really, would be whether or not a particular claimant suffered the harm from the nuclear accident and the extent of that harm. There would be only a limited appeal. My written testimony goes into the details of this entire plan.

I would suggest that it is exceedingly important that we do have jurisdiction lodged exclusively in the Federal courts.

I want to take issue with Mr. Harkins on the question of punitive damages. I would suggest that punitive damages be included, that is, not be excluded, but with this exception. The Federal judge, in one proceeding, should determine whether or not there should be punitive damages, if so, who should be responsible for the payment thereof, and the entire amount, if any, should be paid to the Treasury of the United States of America. That would eliminate much of the problem that Mr. Harkins has mentioned, with which I agree, and I think that this would also be an incentive to settlement, as well as a deterrence.

Senator STAFFORD. Mr. Chairman, could I interrupt here just to ask one question?

Senator SIMPSON. Certainly.

Senator STAFFORD. Did I understand you to say, Mr. Berger, and I want to be clear about this, if punitive damages are to be granted, they should be payable to the United States rather than to the litigant?

Mr. **Berger**. Yes; I said that because punitive damages are a very curious, anomalous concept in the law in America today. That anomaly is that the victim allegedly—I applaud the concept of the three bills before you—the victim gets full compensation, then on top of that, he gets another large sum of money said to be punitive damages. In my view, that should go to the United States of America. Its purpose is to deter outrageous conduct.

We have seen from Three Mile Island and Chernobyl the possibility of such outrageous conduct, and I would suggest that punitive damages should not be eliminated. The concept of punitive damages is a good deterrent. But the money should go to the Government.

Senator **Stafford**. Thank you.

Senator **Simpson**. Thank you, Mr. Chairman.

Now, Mr. Kennedy.

STATEMENT OF WILLIAM F. KENNEDY, HUNTON & WILLIAMS

Mr. **Kennedy**. Mr. Chairman, my involvement with Price-Anderson goes back 30 years, to the hearings that led to the original enactment and to the subsequent consideration in the middle sixties that led to the incorporation of the waivers of defenses provisions.

I am very pleased to be here at the committee's invitation. I have put in an appendix something of my background in Price-Anderson and in tort litigation, and in tort law reform issues, and some disclosures as to representations. I should say, I am here in my own right, and not speaking for any client.

Your invitation asked me to address three bills before the committee, and specifically three issues before the committee. The first is punitive damages on which I will comment in a moment; the second is the idea, in Senator Hart's bill, of eliminating the ceiling on liability; and the third is the provision in Senator Stafford's bill for cross-claims by the utilities that are contributing and by the utility involved.

First, on punitive damages, I think that it is fair to say that the present system of punitive damages, in this country, is scandalous. There is an increasing view, there is a growing law review literature, and there was very interesting dictum in the Supreme Court 2 weeks ago, all suggesting that the current system of punitive damages, particularly in the context of outrageous awards or multiple awards, raises questions under the due process clause and under the excessive fines provision of the eighth amendment.

I would commend to you and to the full committee, and the staff, some of the recent law review discussion on this, and the dictum in the Supreme Court in the *Aetna Life Insurance* case, referred to in my prepared statement.

Next, it would be most incongruous if the committee were to incorporate in the pending legislation a State law punitive damages regime, at the same time that another committee of this Congress, the Committee on Commerce, has before it, and under active consideration, substantial proposals to modify existing State law on punitive damages.

The bills of Senator Danforth, Senator Kasten, the current administration proposal, all address this, and I think that it would be quite incongruous for this committee, while that consideration was going on in another committee, to incorporate a State law system that, I think it is fair to say, is increasingly regarded everywhere as just plain disreputable.

Third, as Mr. Harkins has said and I won't elaborate, anyone who has ever been in one of these litigations knows the complications that are presented by the punitive damages issues in attempting to make a quick and expeditious resolution of the compensatory claim. These issues just make the expeditious and fair resolution of the compensatory claim nearly unmanageable.

I have said, in other connections, notably in a minority view in an American Bar Commission report, something like what Mr. Berger has just said. If there is a view that the criminal sanctions do not reach the outrageous conduct adequately, and you need civil sanctions, that should be done by a statutory civil penalty provision, with carefully defined substantive standards and procedures, responsive to the constitutional considerations that are being raised. The penalty should be paid to the United States, as Mr. Berger has stated. Above all, if you have a civil penalty proceeding, it should be totally disengaged from the compensatory process.

I don't think that we are at a stage right now to design such a system, but I think that it can be done, and if it is designed for tort liability in the general tort reform context, then I think that it should be considered for incorporation in the Atomic Energy Act, and perhaps in other Federal regulatory statutes.

Now, briefly, on elimination of the ceiling, if you want to kill the civilian nuclear program—and maybe the Congress cares to do that, that is a judgment which is a separate matter—that ought to be done in a context where that is debated directly and resolved directly. But the effect of elimination of the ceiling would be to make the private program unworkable. Beyond that, and I think this is something that the committee should focus on, it would mean that you would force contractors to withdraw from defense related nuclear activities.

The idea that you could engage contractors in defense activities, and subject them to open-end liability is simply totally unrealistic. You would have a terribly negative impact on the defense program. The civilian program is one thing, but the national security of the United States is, I think, something beyond a reasonable difference of opinion.

I have more to say on the cross-claim, but it is in my statement. Thank you so much.

Senator SIMPSON. I will have some questions, and we can develop that further.

Now, Ken Feinberg, please.

STATEMENT OF KENNETH R. FEINBERG, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Mr. FEINBERG. Thank you very much, Mr. Chairman.

As one who used to work, as you noted, on the other side as a staffer, I understand what the lights mean, and I will accommodate you as best I can.

I must say at the outset, I have no direct interest in Price-Anderson. I don't represent any parties, or any clients with regard to Price-Anderson. My role here is really to support Price-Anderson because I have witnessed the resolution of a mass disaster in another context, the *Agent Orange* case, where I was appointed settlement master by the court to resolve those claims.

Nuclear disaster is one area that you are very familiar with, Mr. Chairman, and agent orange is another area where you, particularly, are very familiar. You know how to pick your issues, Mr. Chairman, nuclear disasters and agent orange, I must say.

Let me make the following few points, if I may. I think that Price-Anderson is a very valuable and important precedent for dealing with mass disasters. It is ironic, Mr. Chairman, that at a time when the traditional tort system is under such attack from a wide variety of sources, there are also those who want to curtail some of the best features of Price-Anderson, which help to avoid the very problems that this administration and others are trying to deal with in the broader context of tort reform.

I like S. 1225, your legislation, because it tinkers least with the very important features of Price-Anderson that help the future victims of a nuclear disaster: A consolidation of claims in one forum, avoidance of the type of insurance coverage disputes that have plagued the asbestos controversy, for example, and the type of umbrella coverage that will assure prompt payment to claimants. Say what you want about the *Agent Orange* case, it took 7 years to resolve the case. It seems to me that we limit transactional costs in Price-Anderson, and provide prompt resolution of disputes, two problems with the existing tort system.

What we have learned, it seems to me, from the asbestos litigation, and from the agent orange litigation, is that we didn't have a Price-Anderson Act, we didn't have a better way for the prompt resolution of claims. Price-Anderson, I think, is a valuable precedent in these other contexts.

Senator Stafford and others have proposed important refinements in Price-Anderson in the areas of subrogation and punitive damages. As usual, Senator Stafford has very carefully thought out these substantive changes. There are many arguments that I can see in favor of what Senator Stafford proposes. The problem, as I see it, is that when you start talking about subrogation, when you start talking about lifting punitive damages out of the insurance coverage, you are dealing with the possibility of greatly increasing a morass of litigation that will undercut the goal of Price-Anderson in providing prompt and efficient resolution of claims.

There is a lot to be said, it seems to me, for what Senator Stafford wants to do, but I am concerned about the impact of those changes on efficient resolution of the dispute so that the victim can get his or her compensation promptly.

What we must not lose sight of, Mr. Chairman, is that when you start talking about steps to modify Price-Anderson in ways that will increase transactional costs and litigation, we have to examine the impact of those changes on the victim; not on the insurance industry, and not on the utility, but on the victim.

When you start talking about insurance subrogation, you are talking about insurance coverage issues that will impact on the victim. The asbestos controversy is the best example. The real problem with the asbestos controversy today is insurance disputes between the insured and the insurer. It is not really, I believe, between the asbestos manufacturer and the victim.

Subrogation may very well delay compensation to the victim.

The other problem is the impact of the proposed changes on subsequent victims. It is one thing when you have all the victims consolidated who today suffer from an illness; but when you talk about victims of a nuclear accident, there are problems of latent disease, victims who may not manifest the disease for 10, 20, or 30 years in terms of cancer and other illnesses. You may end up with a system that exhausts the supply of damage awards now, and does not leave sufficient funding downstream to take care of those who suffer latent illnesses, and who may not manifest an illness for decades later.

I commend you, as usual, Mr. Chairman, for your foresight in this legislation, and to the extent that I have been a little bit helpful, I am glad to be here today.

Senator SIMPSON. Thank you very much, Ken.

Now our final witness, Kenneth C. Hall, please.

STATEMENT OF KENNETH C. HALL, MANAGER-INSURANCE, GENERAL ELECTRIC CO.

Mr. HALL. Thank you, Mr. Chairman. I appreciate the opportunity of being here today.

I have been engaged in the property-casualty insurance business for the past 39 years, the last 31 with General Electric. Incidentally, my title of manager-insurance has gone as of the last couple of months, and I am now a consultant for insurance programs in preparation for my retirement at the end of this year.

I have been intimately involved with Price-Anderson since its inception in the mid-1950's and through its many changes to date. I agree wholeheartedly, Senator Simpson, with your comments in introducing S. 1225, crediting the original drafters of Price-Anderson with anticipating and addressing many of the concerns which are now only being recognized in other areas.

I would not only urge the extension of Price-Anderson, but in agreement with Ken Feinberg, I would suggest that it be a model for adoption and adaptation in other areas of serious liability exposures. As a matter of fact, many of us have been working for several years on a plan modeled somewhat after Price-Anderson for application in commercial aviation disaster cases.

The critical task, as I see it, is to maintain the very sensitive balance between the two key objectives of Price-Anderson, of encouraging the best of private industry participation in the nuclear field, and a predictable mechanism for compensating the victims. It is a very sensitive balance, and it is a very critical one, and I think that we have to retain it.

In order to retain it, I think there are three key provisions in Price-Anderson that absolutely must be retained. One is a finite limit of liability, coextensive with the required fiinancial protection. No. 2 is either a legal or economic channeling of liability so that there in effect one source of recovery for victims, and one source of protection for all potentially liable parties. The third critical element that must be preserved is the waiver of defenses, other than causation, for a significant nuclear incident, to ensure prompt payment of legitimate claims. I hasten to comment that that must be kept for a significant nuclear occurrence, but it cannot be brought down to apply to every alleged incident, or we will run into a complete entitlement program for everybody who has any kind of allegation of any kind of a physical or psychological problem anywhere near a plant.

If we do not maintain the omnibus and the channeling features of Price-Anderson, we will wind up with a drastic reduction, if not complete elimination, of commercial insurance. You will wind up with a total loss of the allocation and rationing of insurance, and with the fighting between policyholders over the coverage, all the transactional costs, and a severe dropoff in insurance capacity.

As to the bills, in my opinion, both S. 445 and S. 1761 violate all three of the concepts in one way or another that I have mentioned, and I think would result in a horrendous drop in the amount of liability insurance to the point where you may find we are in the same situation we are in many other areas today where commercial insurance is virtually unavailable.

S. 1225, on the other hand, does retain the economic channeling, it does retain a finite, although much greater, limitation of liability than the current bill, and retains the waivers for extraordinary nuclear occurrences and clarifies extension of coverage to waste activities. If the utility industry is willing to, and legally can, accept the $2 billion limit, it is my opinion that insurance and suppliers would find the terms of S. 1225 completely acceptable.

I would personally support the key concepts inherent in S. 1225 as introduced. I congratulate its sponsors for having evaluated all of the arguments expounded in recent years in introducing a well-balanced bill that is, in my opinion, fair and reasonable from all viewpoints.

I would encourage its adoption with one change, to make the indemnity provisions for contractor operations mandatory rather optional. I think that with the approach taken in S. 1225, we can retain the insurance capacity that we have, we can maintain full industry cooperation and participation in both commercial and the Government contract operations. I think that we will have a balanced bill for participation of industry, participation of the insurance industry, and a reasonable and fair compensation system for the victims of a major nuclear incident, which is the twofold key purpose of Congress, as I understand it, in the original adoption of Price-Anderson. It is my understanding that it is still the intention of Congress. If that is the intent, then I think something along the lines of S. 1225 is the proper answer to the renewal coming up.

Thank you.

Senator SIMPSON. Thank you very much, Mr. Hall.

I recognize the presence of my good friend from Maine, George Mitchell, who has been a fine participant in the deliberations of this subcommittee. It is always a pleasure to work with him.

I am glad to have you here.

Senator Mitchell. Thank you, Mr. Chairman.

Senator Simpson. I will proceed with some questions, and then we will go to the other members of the Senate panel.

The question is addressed to Mr. Harkins and Mr. Berger. In light of your respective roles in the litigation of Three Mile Island complaints, I wonder if you would please briefly comment on the testimony of the other witnesses, and in particular expand on whether, from the perspective of plaintiffs and defendant in that litigation, you prefer to litigate a case like TMI under Price-Anderson, or under normal principles of tort law.

Mr. Harkins. Mr. Chairman, that, I think, is a question that I could feel very comfortable in answering. I would much rather litigate under Price-Anderson than I would under the principles of general tort procedure. Price-Anderson, as indicated by, I think, virtually everyone on this panel, has important transactional cost efficiency provisions. It is unlike, therefore, many other situations in which transactional costs become a very large part of any amounts in controversy, and are, therefore, lost to the victims.

I want to go back, however, and make a slightly different observation, which I think really directs itself to the question underlying your concern, I believe your concern.

Three Mile Island was not a serious accident in relationship to what I think was originally thought to be the kind of serious accident by the Congress that might require a large amount of compensation available to the public, it was not like the current Ukrainian accident, yet, it has spawned thousands and thousands of law suits.

When the bill was passed in 1957, I don't think anyone contemplated that something like Three Mile Island would give rise to thousands of law suits. What has happened in the interim is that the tort system has evolved radically in that 30-year period. The bases of liability have expanded, the defenses have narrowed, the types of injuries, compensatory in nature, which for recoveries are permitted, have expanded. Then, of course, punitive damages, which were virtually nonexistent in 1957, have become a regular part of tort law. What we are seeing, therefore, is that all of the changes in tort law are overtaking a system which did not necessarily contemplate this, but yet the system has worked well to date, so long as we don't allow the transactional cost problem to become aggravated by fighting among defendants, by subrogation claims, by third-party claims, by over claims. So long as we can keep it as it now is, we can avoid all of the problems that are introduced by all of the changes in tort law.

Mr. Berger. Mr. Chairman, when Price-Anderson was enacted, we had a totally different situation from that which exists today. It was an attempt on the part of the Congress to reach a delicate balance between States and the National Government. However, we now know, not only because of Three Mile Island, but because of the recent events in Chernobyl, that we are dealing here with national policy of national significance, if not of international significance.

We cannot rest in the belief that the amount of damage caused at Three Mile Island will not be exceeded in the future. As a matter of fact, there are many people, including the publishers of today's Philadelphia Inquirer, who seem to fear that we are going to have another Chernobyl right here in the United States, with the over 100 reactors that we have.

I say that one of the things that should be done is to retain what the initial goal of Price-Anderson was. Yes, I would prefer to litigate under a Price-Anderson mode than the normal tort, but I suggest that there be a clear-cut Federal jurisdiction to take care of the entire matter.

If my proposal for the Federal court to have a mandatory, all-inclusive class to take care of all of the claims of whatever nature, economic harm or personal injury, would be adopted, the industry would have all of the benefits of a chapter 11 proceeding, with none of those horrendous burdens as demonstrated by Manville, in which I am one of the principal participants right now.

I would suggest, therefore, that Price-Anderson's major defect was to state that State law shall govern substantive questions. Once you eliminate that, and recognize that we are really here dealing with questions of national and indeed international significance, it necessarily follows that we should have uniformity moreover, we should have a minimizing of transactional costs. Instead of having thousands of cases brought all over the 50 States and 6 territories to which reference was made by Mr. Harkins, there would be one court, one case to resolve the entire matter. Incidentally, the statute of limitations should be extended to take care of the downstream problem mentioned by Mr. Feinberg.

Senator SIMPSON. Let me ask one other question, and then we will go to Senator Mitchell, and try to keep to the 10 minutes each.

This is, I guess, for all of you. I appreciate your very interesting views with regard to the litigation of the asbestos claims and the TMI claims, and the advantage of Price-Anderson theories versus the other. In varying degrees, each of you have commented on the problems associated with the multidefendant law suits where mass tort litigation is involved.

If you could just very swiftly each of you, and I mean that, so that we can move forward, expand on what impact the presence of multiple defendants has on the prosecution of a case, or proceeding with a case, comment specifically on how litigation affects the ability of claimants to recover, which is a pretty good and interesting thing. I am always fascinated with rule 1 of the Rules of Civil Procedure, and I remember it very well. Nobody even knows what it is around here, it is so short, and there is one sentence. It says: "The rules that are referred to"—it is the same in every rule 1 in every State that ever adopted it—"shall be construed to secure the just, speedy, and inexpensive determination of every action." We are lost in the swamps on that one in this place, and especially in what we do in dealing with issues of compensation.

Anyway, on the issue of ability of claimants to recover, including both the speed and the amount of recovery, as well as the associated transactional costs, and then comment on whether it is possible to divorce entirely the effects of multidefendant litigation by first litigating the public liability claims, and then having the various defendants struggle forward to sort out their differences in a wholly separate subrogation action.

I know that it is a multiloaded question, but if you could give some swift thoughts on that, it would be deeply appreciated.

Mr. **Berger**. I would like to jump in fast and say, I am not only in favor of bifurcation, but trifurcation. I think that if you had a single court, a Federal court, and it must be a Federal court, with the exclusive jurisdiction to hear and determine the cases arising out of a nuclear accident, that you would be able to accomplish the following:

First, the court would be ordered to handle the question of compensation for victims, and that can be taken care of very swiftly under the suggestion that I made in my written statement.

Second, the subrogation and other questions that have been mentioned should be determined by the same court. And that can be done in a very swift process. But it must not be permitted to hinder or delay the settlement and disposition of the claims of the victims.

Senator **Simpson**. Mr. Kennedy.

Mr. **Kennedy**. Mr. Chairman, Mr. Hall referred earlier to a proposal that a number of us on behalf of the aviation industry developed with respect to commercial aviation accidents, and I want to observe simply about that proposal, that beginning with Price-Anderson as a model, among the modifications we made was precisely what Mr. Berger is suggesting, exclusive jurisdiction of the Federal court—Federal question jurisdiction, and exclusive jurisdiction, defining rights of recovery as governed by a Federal right of action superseding State law, and governed by Federal common law, all to simplify the legal issues and the expedition of claims. We also provided in that proposal, and I think that Price-Anderson currently should work this way, that the compensation issue will depend solely on causation and measure of damages, not fault and not involve cross-claims or litigation among other parties.

There is one identified source of funding to pay the injured persons on the basis of determination only of two issues, causation and measure of recovery. That is clearly the logical way to go. The asbestos cases teach us the lesson in another way in terms of cross-claims and litigation among the parties. As penance for my sins, I can tell this committee, which has responsibility for Superfund, Superfund is also teaching that lesson.

You have the whole cleanup program of the United States in a litigation disaster because of the joint and several liability and contribution issues. I realize the Senator has attempted to do something about this in the amendments that he has sponsored with Senator Domenici, but Superfund is currently another example of the delay and transaction costs, and counterproductive lawyering that goes on where you have cross-claims and litigation among the parties.

Senator **Simpson**. You shouldn't have touched on that. George and I are on the conference committee, and we have enough pain without that injection there.

Mr. **Feinberg**. I was going to say, Mr. Chairman, in the context of mass disasters, I am not sure you would ever be satisfied about how we go about implementing rule 1 of the Rules of Civil Procedure because I have become skeptical as to how well the courts can deal with those problems. I think that we expect too much of the courts in the context of cases like this, where causation is so dubious, or incapable of legalistic proof, and the unpredictability of how many claims there are downstream from people who may not manifest the disease for decades later, leads to real disputes over compensation. Therefore, I have grown to question just whether or not the courts really can effectively deal with these problems. Price-Anderson, on a spectrum, probably comes the closest. It is a very big problem.

Senator SIMPSON. George, please.

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Chairman, I was interested in your reading of the rule 1, with which I am familiar, and the discussion about the transactional costs.

One of the things that I think is most striking about this whole debate is how frequently those who are the principal contributors to delay in transactional costs are the ones who complain about it.

No offense, Mr. Hall, as an insurance person—I used to work for an insurance company—I know through my own experience in the courts. I remember, as a Federal judge, I presided over a hearing in the asbestos cases in which 24 defendants, represented by 24 lawyers, came into a Federal court to argue about where a dying plaintiff would be deposed, an absolute transparent effort to delay the deposition until this man died. On the way out, discussion occurred about how expensive this process is. Twenty-four highly paid lawyers in there, all charging the insurance company, Mr. Hall, 1 of them could have done the job for 24 of them, but they all got in there, and everybody had their meter running, and sent the tab over.

There is incredible delay and expense involved, but almost invariably they are induced by those who are seeking to delay a disposition of the claim, and it is their right to do so under our system. They don't want to pay the cost of the claim, and that is what the problem is. It is those who cause the delay, incur the costs, and then come in and complain to Congress about the delay and the costs that have been incurred. It presents us with a very, very difficult problem—how do we get at it?

You are right, Mr. Kennedy, to raise the Superfund thing, because Senator Simpson and I have been wrestling with this for 6 years, trying to figure out a way to get these sites cleaned up, and not have the funds diverted into this almost endless legal wrangling.

Mr. KENNEDY. Senator, if I may respectfully, I agree with you that it is the profession, and on both sides of the bar, that is at fault here. What is fundamentally at fault is a structure which creates these wasteful incentives. The virtue of Price-Anderson is that it is designed differently, and minimizes those wasteful incentives.

Senator MITCHELL. Except, Mr. Kennedy, in one very significant respect. If you impose an absolute limit on the amount that a defendant must pay, and you include the costs of defense against all claims as part of that, there is a total incentive to oppose, defend, and delay, because it can't possibly cost you any more than the maximum, and it might cost you less.

Mr. **Kennedy**. Senator, I don't think the system works that way. There is an incentive of another kind, which is the public posture of everybody to have a fair and expeditious and clean-cut resolution of those claims.

Senator **Mitchell**. Mr. Kennedy, whenever fairness comes into conflict with somebody's economic interest, boy, it doesn't take long for that to be the call.

Mr. **Kennedy**. We are talking short-term and long-range economic interests.

Mr. **Harkins**. I would like to jump in, Senator.

Senator **Mitchell**. What do you think about that. You represent the companies.

Mr. **Harkins**. The nuclear insurers.

I am happy to tell you that, I think, as professionals, and I am looking at my chief adversary next to me, I think that it is fair to say that in the first test of the act, there was no delay imposed by the lawyers seeking some kind of tactical advantages and, because of the structure of the act, Senator, and the way in which the decisionmaking could go forward from the defendant's side, and a committee represented primarily by Mr. Berger on the plaintiffs' side, we could get right to the question, for those who deserved it, of how much. It worked beautifully in practice.

Senator **Mitchell**. But you made a big leap, Mr. Harkins. Mr. Feinberg discussed the problem of establishing causation, so for those who deserved it, in your mind, would be those who have established causation, I presume.

Mr. **Harkins**. Yes.

Senator **Mitchell**. That would be the threshold question.

Mr. **Harkins**. What was contemplated, Senator, when this act was adopted, it was contemplated that people in the event of release of radiation would be burned, their property would be destroyed or unusable, they would be suffering for years to come from latent diseases. All of those are situations caused by radiation released in significant quantities.

In the Three Mile Island accident, none of that happened, as it turned out, happily and fortunately, I am a Pennsylvania resident, and, in fact, I live downwind of the reactor, if you want to know, where you have to draw some line is at what point is a claim properly brought before the court, or before the administrative process for recognition.

Mr. Berger's claims for recompensing those who spent money evacuating because the Governor advised it, or because the NRC couldn't give a clear answer as to the status, were recognized by us. We said, "yes," even though in a technical sense those might not be real damage claims that tort law should recognize, we said, "we are going to jump over that and we are going to put a large fund in the court, through rule 23, to pay those kinds of claims."

Men and women who lost wages because they had to evacuate, townships who had to hire people to fill the roles of those who evacuated, or had to pay the wages of those who evacuated, which cost them money either way, we settled those claims. But when somebody says, "My gastric ulcer was caused by Three Mile Island," and he says that gastric ulcer was one that arose 5 years after the accident, I think there, Senator, we would draw the line, and we would say, we will fight causation on that one.

Senator **Mitchell**. That one is easy, Mr. Harkins.

Mr. **Harkins**. It is very easy.

Senator **Mitchell**. It is the gray ones that are hard.

I want to ask Mr. Berger one very short question, and then ask Mr. Harkins and Mr. Feinberg and Mr. Kennedy to comment on his proposal of a single Federal court to have exclusive jurisdiction over such cases.

Mr. Berger, do you propose that it be a permanently established court for that purpose, or that it be the Federal court in the jurisdiction in which an accident occurs?

Mr. **Berger**. I propose the latter. And I recognize that because of the national significance of a nuclear accident, there might be class actions, or actions brought in other Federal courts. We have a system, under section 1407 of the Judicial Code, where the multidistrict panel would then refer all of the cases to a particular Federal court.

I don't want to see another layer of Federal judiciary created. What I am in favor of is the recognition of exclusive Federal jurisdiction in a Federal court. That is the one that is going to be the selected one, fine. And it will be empowered to certify a mandatory, all-inclusive class to cover both economic harm and personal injury cases.

With respect to the problem that Mr. Harkins raises about personal injuries, or alleged psychic injuries, my proposal, which is right in the written statement that I have filed, calls for this Federal court to require of the lead counsel for the plaintiffs to submit a settlement plan. And that plan will have a claims handling facility as part of it. I think that that would have the capacity and the ability to determine whether or not causation exists and the extent thereof.

Senator **Mitchell**. Could I ask Mr. Harkins, Mr. Kennedy, and Mr. Feinberg just to briefly comment on whether you favor or oppose the proposal just made by Mr. Berger.

Mr. **Harkins**. I believe that the proposal by Mr. Berger goes far beyond the needs at hand, to the extent that he has this mandatory class, to the extent that he has a mandatory claims handling facility.

Senator **Mitchell**. What about a single Federal court with exclusive jurisdiction?

Mr. **Harkins**. Yes, absolutely, Senator, I believe that that is highly necessary. We had it until the third circuit ruled there wasn't Federal question jurisdiction. We had it and we had the efficiencies that go with it. I think that we should get it back legislatively.

Senator **Mitchell**. It would be better for the defendants as well as the plaintiffs, wouldn't it?

Mr. **Harkins**. For both sides, absolutely. It makes all of the advantages for the system, and it doesn't give any unusual advantage to either party.

Mr. **Kennedy**. I would subscribe to what Mr. Harkins has said. We, long ago concluded in other connections that in the mass case, the right solution is exclusive Federal jurisdiction in a single Federal court. I don't think that you need a standing court, it should be the court where the occurrence took place. You do need to modify section 1407 to permit transfer and consolidation for trial, as well as pretrial.

I am not persuaded by Mr. Berger that you need the additional procedures of statutory prescription of a class, and a statutory prescription of a claims facility. I think you can leave that to the discretion of the court.

One technical point. There is a fair amount of Federal jurisdiction learning to the effect that if you wish to create Federal question jurisdiction, you have to do it by creating a Federal right of action. There is some controversy among the authorities on that, and I think the committee would want some technical advice as to how to do the exclusive jurisdiction provision.

In the aviation proposal that I referred to, we did it by creating an exclusive Federal right of action, and I think that may be the clean way to do it.

I don't know that you need to tell the court in advance too much about how to manage the case, so long as it is a single court.

Mr. FEINBERG. I also favor a single court.

Senator MITCHELL. Mr. Hall.

Mr. HALL. Could I come back to the question you asked prior to this one?

Senator MITCHELL. Sure, go ahead. I think you ought to have a chance to respond.

Mr. HALL. I don't want to defend the insurance companies because, No. 1, I haven't worked for one in 36 years, but your comments in that area are the same in the whole tort system, and I have debated this with people. You can blame it on anybody. I don't think that there is any one group to blame. I think that it is the system. You can blame the plaintiffs' bar, or you can blame the defense bar, you can blame the insurance companies, you can blame manufacturers, judges, juries. There is plenty of blame to go around, and everybody is wrong.

The problem is that the system not only gives an incentive to do these ridiculous, nonsensical things that they do, but it puts virtually an obligation on each one of them to do it, and they are subject to malfaisance and everything else if they don't.

The tort system is so ridiculous, and so antiquated, it is a buggywhip age system that is being applied to a jet age society, and it is absolutely ludicrous, ridiculous, makes no sense. It has been dead for years, and it doesn't know enough to lie down and let someone bury it.

In a mass accident case, the current tort system is just totally and completely unworkable, ridiculous and nonsensical. It is going to give everybody problems no matter what the incident is in a mass accident under the current tort system under any one of our State jurisdictions.

As far as combining the defense with the indemnification, there is incentive to fight that and to spend the defense dollars because it is not going to cost you any more, bear in mind that it only becomes critical if your total involvement is your total committed capacity. In S. 1225, we are talking roughly a $2 billion capacity. So an incident that is something below $2 billion, you don't run into that conflict.

Senator MITCHELL. The current is what, $665 million?

Mr. HALL. Yes, it is $675 or $700 million.

If it looks like it is going anything above that, where you would have that incentive possibility—it is a somewhat Machiavellian incentive, but if it is there, I think there are provisions in current Price-Anderson where you have the congressional involvement above that point for their involvement in the claims activities and oversight jurisdiction in a way to control it. It is certainly controllable at that point.

So, I don't think that you really get into that like you would in a typical insurance case where someone has a policy with only $1 million limit, including defense. So, if I spend $1 million on defense, I can't lose any more. I think the current Price-Anderson takes care of that.

We can't avoid all transaction costs because there are two things that we cannot do, and the things that we have avoided in Price-Anderson in the last 30 years. We still can't avoid the question of causation, and the question of damages, unless we want to go to a scheduled compensation system, then we can do that. But as long as you are talking normal damages, you are going to have litigable issues on causation and damages. There is, therefore, some drag, and you are not going to settle a case in 30 days. You are going to have to determine causation. To your point, there are black and white cases, and the gray ones are going to give us trouble, but I think we have to live with that unless we decide that we are going to have an automatic compensation system, which we can't do with tort benefits, without bankrupting everybody.

Senator SIMPSON. Mr. Hall, you are the only nonlawyer on the panel.

Mr. HALL. Yes.

Senator SIMPSON. I could tell that from your outburst.

Senator MITCHELL. Did you go to law school, Mr. Hall?

Mr. HALL. No, sir.

Senator SIMPSON. Prosser would be a veritable pinwheel in his grave if he had heard you say these things about the tort system.

Mr. HALL. I think he would spin on several things that happened, including some of the current judgments I see coming down, published in the papers.

Mr. KENNEDY. I think that it is fair to say that the authors of section 402(a), that are the cause of some of our woe, would tell you that they would like to take another look at it, not Dean Prosser, of course, who is gone, but some of the other authors.

Senator SIMPSON. How would you like to have been practicing before Judge George Mitchell? It would keep you alert, I found that in my time with him, and that is why it is fun to get into it with him, because he is so bright, and he is a remarkable lawyer and judge.

Let me ask you, Ken to comment, if you please, on whether it is possible to divorce entirely the effects of multidefendant litigation by first litigating the public liability claims, and then having the various defendants, as I said, sort out their differences in a wholly separate subrogation action?

Mr. Feinberg. I think you can do it. I think that bifurcation is possible. The problem with it, it seems to me, is that by bifurcating, my experience tells me, you limit the possibilities of settlement prior to completion of the first stage of a liability trial.

Especially in mass disaster cases, Senator, if you have five, seven, or eight defendants, where causation is dubious, or at least is a question as to how much each defendant should bear of the total liability, what I found in *Agent Orange* was that by refusing to divorce and bifurcate, you encouraged the defendants to work out, in advance of trial, a settlement of the dispute, rather than confront the unpredictability of how much each defendant might be found liable, especially in the absence of causation where it was very unclear as to what would be an appropriate share of the liability to begin with.

So, although, I see some real advantages to bifurcation, in terms of efficiency, if you are looking to try and settle cases without resorting to the traditional trial with a jury and factfinding over months and months, I see some leverage in keeping the case together in one single unitary structure.

Senator Simpson. Let me ask you this, and anyone might comment. In your testimony, however, you talked about the time honored legal tradeoffs. As you increase the likelihood of compensation and minimize the legal obstacles to recovery, the loss simultaneously limits the amount of compensation available to the individual claimant.

To what extent do you view the channeling feature of Price-Anderson as a central factor in minimizing legal obstacles to recovery, and how does that system compare with the litigation in the asbestos and the agent orange claims?

Mr. Feinberg. I think that it is essential to the whole system. Mr. Schmalz will talk about it this afternoon, but the idea of predicting who bears responsibility in terms of compensation, and where that compensation will fall, it seems to me, is an essential way to avoid litigation among conflicting utilities and conflicting insurers.

So, I see that as sort of the linchpin of Price-Anderson, and something that ought to be replicated elsewhere.

Mr. Kennedy. I couldn't add anything to what Ken has just said. I think that he is right on the mark.

Senator Simpson. Mr. Harkins.

Mr. Harkins. I would like to raise a practical consideration, Senator. I could not today represent all of the defendants in the Three Mile Island litigation under the omnibus insurance provision if, following this first round of litigation, there were to be fights among the defendants either over subrogation or the like, or with their carriers on any separate liability issues.

Therefore, it is essential that that channeling not only be channeling as it is in the litigation with claimants, but that the channeling be within a self-contained system that does not permit this extraneous litigation to try to then redistribute risks after the first round is over.

I would, therefore, leave you with the question: Is there any benefit to try to redistribute risk by subrogation or otherwise, while at the same time you would be losing the efficiencies necessarily that you have achieved in compensating the victims?

Mr. BERGER. Looking at it from the standpoint of the victims, I think any system which would permit this inevitable delay, which is implicit in what Mr. Harkins has said, ought not to be advocated by anyone.

I think that the concept of Price-Anderson; the way it is structured, is good. My real serious objection to Price-Anderson is the antiquated notion that the whole thing should be based upon State substantive law. I think that once you attack that, and you get rid of that, we will be in much better shape.

Senator SIMPSON. Let me ask you another question before I go back to Senator Mitchell, if he has any further questions. This is for the five of you.

You all have discussed in your testimony the high transaction costs. Here we read that in the nomenclature of attorney fees. We have, in Superfund, read that as the bulk of that being attorney fees. I am not triggering a gland, I don't want to get into that, but transaction costs up here, we think, a great percentage of that is in this area of compensation.

Let's leave it as transaction costs associated with the litigation of mass tort, you all point to that as a major disadvantage to the full compensation of victims. A couple of you have had experience with asbestos, and the most egregious examples of large sums being spent. To what extent are those transaction costs, however defined, going to increase if we move in the direction of a fault based compensation under Price-Anderson in its newest form, if we would go to that, and particularly with a system that allows unlimited subrogation, and do the advantages of a broader subrogation pay off from the standpoint of compensating accident victims?

Mr. KENNEDY. Mr. Chairman, the empirical study on this, by the Rand Corp. in the asbestos context, found that 60-odd percent of the amount that the insurers paid out on account of asbestos claims went to either defense lawyers, plaintiff lawyers, or costs of investigation and preparation.

Out of every dollar the insurers paid out in the asbestos context, roughly a third or thereabouts, a little over a third went to the victim. That is a disgraceful situation. Ken has been very eloquent on it, and so have others. Why is that so? It is partly because the defendants are resisting paying the claims in the first place, but it is also heavily because they are cross-claiming against each other, because there is litigation between insured and insurer, litigation among insurers, and the like.

The asbestos cases teach us a great lesson, and that is that the waste in the system is going on issues of fault, going on issues of comparative fault, and contributory fault, going on issues of who pays what proportion of the tab.

Price-Anderson, it seems to me, deals with this in a very straightforward and very effective way. Some of us who were there in the fifties and sixties, who were hoping that it would work this way, I think, can feel vindicated by what Mr. Berger and Mr. Harkins are telling us as to how it has worked in TMI.

I think that it would be just a tragedy if this committee, or the Congress, were to take the system away from its original objective, which was assurance and expedition in paying claims, and bring it back to the system that Mr. Hall has been, in my judgment, so properly scathing about.

I think that we, in the legal profession, have a fair amount to account for collectively, jointly, and severally accountable to my mind, for what is a system that is badly in need of repair in the tort area generally.

Senator SIMPSON. George, do you have any questions?

Senator MITCHELL. If I may, Mr. Chairman.

Senator SIMPSON. Please.

Senator MITCHELL. Mr. Kennedy, that is a very eloquent statement, but let me back up and ask a more fundamental threshold question. You said, assurance and expeditiousness in paying claims was one of the objectives of Price-Anderson. Indeed, it was, but you left out another big one, and that was, of course, the desire of the Congress, in the context of the fifties, to remove any growth deterrent to the commercial nuclear power industry presented by the threat of unlimited liability claims in the event of a nuclear incident.

We talked about the mechanics and the details, but it seems to me we, in the Congress, have an obligation to step back and ask the more fundamental question, in the light of knowledge acquired since then: Do we want to pursue a policy which, in effect, is one of national encouragement of the development of a particular industry, which is really another way of saying, removal of deterrence to it, selecting one industry above all others?

Mr. KENNEDY. Yes.

Senator MITCHELL. My own State has a large nuclear powerplant, and since the Department of Energy has recently identified two sites in Maine as possible repositories for high-level nuclear waste disposal, it has become perhaps a dominant issue in my State, and not a week goes by when I am not asked over and over and over again. Why does the Federal Government subsidize the nuclear power industry through the Price-Anderson Act, and not subsidize anything else?

Why are you doing this? Does it make sense as a national policy, as opposed merely to being walked into something that we started years ago?

Mr. KENNEDY. I have spoken to that, sir, in my prepared statement very briefly.

I ought to say, about my own history, which is reviewed in an appendix, that for 10 years, between 1955 and 1965, I was counsel for General Electric's Nuclear Energy Division. We thought then, I still believe, that nuclear energy was in the national interest as another energy source. We thought then, and from what I know of the issue, I still believe that the advantages outweigh what are conceded disadvantages.

Let me say that events, since that period, clearly have raised questions of the kind you are putting in the minds of a large part of the American public, and in the minds of a number of people in public life and in this Congress. My observation about that goes like this:

First, recognize that Price-Anderson is in two parts, it is the private nuclear electric power program, and it is the Government program.

Senator SIMPSON. Excuse me, Mr. Kennedy, I must interject here for a moment. I have another obligation that I must get to. I am going to leave the hearing in charge of Senator Mitchell. He can proceed, he has some further questions. I have some further questions that I will submit in writing.

I appreciate your testimony, it is very helpful to us. It is a very tough issue, sorting through the real issue is how do we get the money out to the people who are hurt as fast as we can, and do that with resources that are going to be available, that will not be gobbled up somewhere through various transactions. You have helped guide our way toward that. I thank you very much.

George, I appreciate your taking over.

Mr. KENNEDY. Senator, just to continue the response, if I may.

First of all, Price-Anderson does apply to Government nuclear programs, defense related programs. Clearly, I don't think your question is addressed to that side of it. On the private program, I have said in the prepared statement, I have said, over a period of years, if the Congress wishes to terminate the nuclear electric power program, and there is a strong difference of opinion around the country about that, and let's agree that there are legitimate concerns on both sides, and there is a balancing judgment for the Congress to make. But if the Congress wants to make that judgment, I submit, sir, you should do it upfront, straightforward, direct, and debate the merits, the pros and cons from a safety point of view, and an energy policy point of view of nuclear power, resolve that issue one way or the other.

If you resolve it in favor of termination, so be it. If, on the other hand, you resolve it in favor of continuing the program, then you ought to have this protective system in place against the possibility, which we all hope is quite remote, of a serious off-site nuclear accident.

Senator MITCHELL. I would like to hear any other comments.

Mr. HARKINS. Senator, I would like to perhaps offer an observation based on the comments you made about the Superfund problem.

I think that the essential difference for purposes of the question you asked a moment ago is this: In the Price-Anderson situation, from the very beginning, everyone arranged their affairs, that is, the question of risk bearing, if you will, knowing what the precise outcomes would be in the event that there was a situation calling for compensation. The situation was addressed, in other words, prospectively. The problem you face in Superfund is that you try to now, and it is a desperate problem, come back and retrospectively impose rules to try to cure a problem in a situation where the people involved hadn't planned ahead to meet the rules you now need to impose. The confusion that then reigns is as you describe it, it becomes terribly difficult to sort your way through it.

The great advantage that you would lose, if you now reversed the Price-Anderson mechanism, is that you would have lost that tremendous advantage that is gained when you can plan ahead, and have your affairs and your relationships established knowing what the outcomes will be.

Senator MITCHELL. But, of course, Mr. Harkins, Price-Anderson was originally enacted as a temporary measure to extend for 10 years, and then it was extended twice at the request of the industry.

Mr. HARKINS. Yes, Senator, except that the 10 years was really in relation to encouraging new reactors after that first 10-year period. I don't think that you were going to abandon the ones that were built in the first 10 years.

Senator MITCHELL. You have really touched on what is the central question. We embarked on a national policy based on a widely held set of beliefs of nuclear power. It seems to me that at the very least it may accurately be said that information that has been acquired since then, and events that have occurred since then, call that widely held belief into question. Yet, what we are saying is that we have to continue the policy because we started the policy.

Mr. KENNEDY. If I may respond, Senator, I don't think that that is right. I think that you can reexamine the nuclear power program. I think that it is almost inevitable that you will in the light of recent developments. I hope that the Congress will make a judgment as to whether they want to see that program continued and, if so, how and on what basis.

If you make a judgment to the effect that it ought to be terminated, and I want to say that I believe it would be a serious mistake, but if you make that judgment, then you don't have a Price-Anderson problem, other than continuing the protection on the contract side, and continuing the protection for commitments already made.

If, to the contrary, you make a judgment that the program should go forward, then I would say to you, sir, that you need the protective system of Price-Anderson.

Senator MITCHELL. I am going to give Mr. Feinberg and Mr. Berger a chance to comment, but, Mr. Kennedy, you are stating the question obviously in the light of what I would say, if I were sitting on the bench, a leading question, because it is obviously intended to produce a certain answer.

I would state the question this way: We do not, as a nation, committed to a free enterprise system, have the Government select certain industries and say, we are going to enact legislation to foster the development of that industry over another.

We have done that in this case, in the case of the nuclear power industry. Now, if someone were to say, should, as a nation, at the very least, withdraw the underlying basis of Government support, and leave the nuclear power industry in the same standing as every other private enterprise in this country—the coal industry, the oil industry, and others—to compete or not compete, survive or not survive, on the basis of competition.

You define that as saying, the Government is terminating the industry, but I think that it could be fairly defined as the Government withdrawing an underlying basis of subsidization through the form of the Price-Anderson system, which no other comparable industry enjoys. So what you are saying, really, is that absent such underlying basis of support, the industry could not survive.

Mr. **Kennedy**. Yes.

Senator **Mitchell**. So that is an indirect death sentence, and what you are saying is, if you are going to do that, then just impose the death sentence.

Mr. **Berger**. Mr. Senator, it seems to me that what you have just said may be favored by a great many people in the United States right now. But I would like to suggest this: there is a middle ground. Whatever the national policy will be will be determined by the Congress, and I agree that it ought to be reexamined in the light of facts as they exist now, and not as they were 30 or 35 years ago. However, we do have a nuclear power industry, it exists. We have a specific problem on which, I understand, we are focusing today, that is, how do we best get the victims of this accident that will occur unquestionably in the future paid fully, timely, with the least cost, in the most efficient manner.

I respectfully suggest that the answer to that is a program something along the lines that I gave suggested.

Senator **Mitchell**. Mr. Feinberg.

Mr. **Feinberg**. Let me, if I may, Senator, say two points. I think you asked the $64 question. I always view Price-Anderson, in at least one respect, as a remedy to facilitate victim recovery. We have plenty of programs like that, that you and others have voted for, the Black Lung Program, and other programs that are designed to provide prompt payment to victims.

So on one level, I would say that you are absolutely right, that if we don't want to subsidize nuclear construction, we shouldn't. On the other hand, and maybe it is a hidden benefit, I have always looked at Price-Anderson as a more effective way than traditional tort to get help to victims of society that are hurt by an accident.

The second point, that really is the flip side of what you say, is that in my experience in the mass disaster context of agent orange or asbestos, what you are seeing under the traditional tort system is deterrence with a vengeance. What has happened in the last few years, is that very socially beneficial processes—that you and I would agree are very socially beneficial—manufacturing certain vaccines, for example, are simply not possible because the tort system has been so manipulated that it simply is no longer financially possible or economically feasible for certain socially beneficial processes to be undertaken. That is the flip side, it seems to me of what you are saying.

The tort system in the great bulk of situations is time honored and should be preserved. But when you get to certain product liability problems, like the manufacture of certain drugs or vaccines, we are seeing today that it simply cannot be accomplished because of the exposure in the traditional tort system to open-ended liability, with punitive damages.

It is in that narrow area of cases that I believe, for the victims' sake as well as for society's benefit, the regular tort rules simply cannot apply any more, because I don't think that we are going to get the end result that you or I would contemplate.

Mr. **Kennedy**. Senator Mitchell, if I may say one thing. Going back to the original consideration of Price-Anderson, it was always the view of the sponsors of the legislation that it had a dual purpose. One, to promote the industry; but, two, to protect the potential victims, and it is that second purpose that endures, is important, and makes an independent case for Price-Anderson. It seems to me clearly essential, both for the activities that are already committed, and for anything which the Congress thinks ought to be continued, and it is clearly superior to the tort system.

Senator MITCHELL. But you see, Mr. Kennedy, the imposition of the cap on liability is central to the concept of Price-Anderson because it enables the obtaining of insurance within that cap.

Mr. KENNEDY. Yes.

Senator MITCHELL. But the clear implication of that is expressed throughout the whole history, in the event that that hoped against disaster does occur, which exceeds that, there will be public funding available.

Mr. KENNEDY. That was understood from the beginning.

Senator MITCHELL. It was understood right from the beginning.

Mr. KENNEDY. Yes.

Senator MITCHELL. Everybody said so. That is an absolute, clear, and direct measurable subsidy to a particular industry that enables it to develop in a manner that it could not otherwise have done, and which is not available to others in a so-called free-enterprise, free-market system. It is that question which we must ask. Are the benefits to society so great that we, therefore, wish to construct this special set of rules in this one case?

You see the difficulty of saying—Mr. Berger said, look, we have these plants operating—you get an infrastructure built, and the continued maintenance of that infrastructure requires the extension of a policy long after the original rationale for the establishment of the policy may have disappeared.

Mr. KENNEDY. Senator, if I may say, and I was there in the middle 1950's before a committee of this kind on this subject, I think that it is fair to say that the purpose of the period of 10 years was not that the thing could be washed out in 10 years, but simply that the Congress wanted to take a periodic look at the way the system worked.

They did that in both the 1960's and the 1970's, and in each case, in my judgment, significantly improved the system.

Mr. FEINBERG. Senator, if you don't have a cap, who is going to pay for downstream victims suffering from latent disease?

My experience in *Agent Orange* tells me that if you don't place limitations on liability, you may be able to deal with the victims who suffer an illness today. You may take the money, lift the cap, and force payment out of the wrongdoer until the company is no longer in existence. Manville is a good example, Manville filed for chapter 11 in the asbestos controversy.

If you don't have a cap, how do you deal with the problem of the latent victims who might not manifest some horrible illness until 1999, or 2005, once the deep pocket company and insurer are no longer available to provide financial assistance.

Again, I am discussing the issue in terms of the victims. I have no brief to carry for the industry, I have nothing to do with this industry; the advantage I see of the cap is to preserve some sort of ordered liability for the subsequent victims who may not seek compensation until the turn of the century. Again, if there is some other way to deal with that, like the Congress appropriating extra funds to handle such claims, then I can see your argument, but from the victim's perspective, I have a problem with open-ended liability.

Mr. BERGER. Senator Mitchell, could I just make this point. It seems to me that maybe we have reached that juncture where we have to have Price-Anderson I, and Price-Anderson II. In the new legislation, perhaps we should consider continuing something like the cap system for those who have relied upon it, and have entered into the industry based upon that system; but to say: Enough is enough. From here on out, you are going to have to meet the standards of other free enterprise, and perhaps we can work it out in some fashion along those lines.

Senator MITCHELL. Mr. Hall.

Mr. HALL. Senator, I don't have any problem with that particular solution, other than going forward. If you want any participation, one of the key problems is not going to be your principal players in the field, but the long, long list of suppliers and subsuppliers with minimal participation, but critical participation.

In 30 years of working with suppliers and subsuppliers under the current system, I can tell you that if you don't have a system comparable to this going on, with the tort system the way it is today versus what it was in the 1950's, I think you would have an illusory program, because even if you wanted to go that route, I don't think that you would have the supply chain available to anybody to do it.

The other thing I would like to mention is, within Price-Anderson, the one thing that we have to keep in mind all the time, there is no other industry in the world that has a system that guarantees the availability of funds, the payment of funds, the ease of funds within that limitation. Everybody talks about the horrors of the limitation per se, and ignores the fact that within the limit, you have a system that not only makes it easy to recover and get judgments, if you would, but also guarantees funds being available, and funds being available over an extended period of time.

I would suggest that there is not another industry in the world that has the kind of public protection that is present, even under our current system, with $600 or $700 million, unless you happen to luck out and hit one of the fortune 100's that has it at the moment. Short of that, you could have major disasters in the United States, with hundreds of millions of dollars of damages, and peanuts in payment.

The flip side of that is a Price-Anderson, under the limitation of liability, that provides for the public something that is not existing without it. My suggestion has always been, you ought not to be talking about scrapping Price-Anderson as a subsidy, and I don't want to get into the argument about the subsidy never costing any money for 30 years, I understand the concept that you are concerned with.

I think, frankly, we should, and I have been arguing for 30 years that we should, be looking at something comparable for other areas, where we have disaster exposures, and the current system is just not going to handle them properly and efficiently. If Bhopal had happened in the United States, it would be just as big a mess as it is in India with the question of the Indian court jurisdiction, and the United States court, and everything else.

I think that unless you have a predetermined system, and some way to guarantee the funds, you are inviting financial disaster following a physical disaster in every field in the United States, other than the nuclear.

Senator MITCHELL. With respect to suppliers, Mr. Hall, they are not liable, and they don't pay retrospective premiums, do they? They have a pretty good deal.

Mr. HALL. What they have, in effect, is an insurance policy, liability remains under tort law, and they are covered by the insurance provisions, the omnibus insurance, and what-not. So from a liability standpoint, they are reasonably clean, the same as I am theoretically reasonably clean because I carry $2 or $3 million of liability insurance on my automobile, and if I kill someone, I probably don't have a financial risk, unless I happen to hit someone who is worth $8 or $10 million.

Senator MITCHELL. Or if you hit one of these lawyers.

Mr. HALL. Yes, I try to avoid lawyers on the street.

Senator MITCHELL. Let me ask one more question. I apologize to all of you for keeping you here, but this is an important subject.

It is my understanding that initially—Mr. Kennedy, you were there at the outset, so you would be the best one to direct this to, and anybody else can comment on it—that onsite property insurance was at $60 million, and offsite, which you might call third-party liability insurance, was set at $60 million.

Mr. KENNEDY. Yes, sir.

Senator MITCHELL. Since then, onsite property insurance has increased to $1 billion, whereas the offsite, third-party insurance, has increased in terms of the insurers to $160 million. If you just look at those figures—I don't know if we should look beyond them, and that is my question—is there some justification for concluding that the offsite, third-party liability insurance has not increased as it should, that is, the first tier has not increased as it should, and if there is insufficient insurance for this purpose, using all of the tiers, what should we do to keep liability insurance covered in pace with inflation, or other developments in this area?

Looking at these figures, does that provide you with a fair analysis of the situation, and if not, why not, and what can we do about it?

I would ask you to answer, and then each of you to comment.

Mr. KENNEDY. I don't think I am competent to answer in terms of the economics of the insurance industry. I would make these observations. I have been, as I said, as penance for my sins, involved in some of the Superfund litigation, and my firm has also done some work on behalf of the American Insurance Association in connection with the Superfund legislation.

What you are looking at there, if you believe the Office of Technology Assessment estimates, are cleanup costs in excess of the net worth of the total industry. If the pollution exclusions don't hold up in court, and that is a big if, as we all know; that would have a devastating effect.

We have had two recent studies of the effects on the industry of the general proliferation of tort claims, the escalation of verdicts, punitive damages awards, and the like, one sponsored by Governor Cuomo of New York, and one sponsored by the Attorney General, the Attorney General's report is before the Congress now, all saying that the property casualty industry has some very significant constraints in terms of its exposures just generally in the tort system, Superfund being a very special and difficult case.

Whatever the right number is, and I don't know what the number is, you have to look at the capacity of that industry not in the context of a specific set of claims, but in the context of its total exposure in a tort system that is out of hand. You may want to explore this with the insurance industry witnesses who are more competent to speak to it than I, but I think that there should be a realization of the total context.

Senator MITCHELL. Does anybody else want to comment?

Mr. HALL. Yes, if I could, just briefly.

Part of that property capacity, of course, is funded by the utilities themselves, similar to the second tier of the liability insurance, so it is not all coming out of the commercial market.

The other thing is that the property insurance is not subject to the tort system per se, and the big problem today in the insurance area is one of predictability, which is the keystone of insurance, and there is nothing predictable, or nothing less predictable in the tort system, and a number of non-U.S. insurers are involved in this capacity in both areas, both the property and the liability, the nuclear and the nonnuclear fields, and just as sort of a guideline in the nonnuclear liability field, in the last 6 months to a year, we have seen major corporations that were accustomed to carrying 200 to 300 million dollars' worth of insurance, which is something comparable to the amount in the nuclear field, coming up into renewal in 1986, and going into current terms. That may be going anywhere from zero to $40 million.

If you contrast this with the nuclear liability insurance which has retained its $160 million, and the involvement of foreign insurers as well as domestic insurers, believe me the ones that are unhappy with the lack of predictability are the foreign insurers, who don't understand the system to begin with.

I think that part of this is just the general reaction to the predictability. Simple things like what is an amputated leg case worth? You pick up the paper within the last week, and you can see a case brought in with a double amputation of legs, which is a serious injury, but to see a court award a jury verdict of $39.2 million, after a 2-hour jury deliberation——

Senator MITCHELL. I will tell you one thing, Mr. Hall, having tried many, many cases, and presiding over many others, there is nothing more dangerous than reading a one-paragraph newspaper report of a trial.

Mr. HALL. Absolutely. I agree with you completely.

Senator MITCHELL. You oftentimes don't know what happened, what the facts and circumstances were. I don't mean to suggest to you that there are not excessive awards, there clearly are.

Mr. HALL. No, what I am suggesting more is the failure of predictability, both on amounts and types.

Senator MITCHELL. Frankly, if I can say it, one of the biggest problems, in my judgment, in the entire system is the unwillingness of the courts to use the power that they have to reduce excessive awards.

Mr. HALL. Absolutely, I couldn't agree more.

Senator MITCHELL. That is the problem, we have gotten so accustomed to the principle of not upsetting jury verdicts, which I think is a valid principle insofar as findings of guilt or innocence, or negligence or nonnegligence, that we have extended it unwisely to an area where the same principle does not apply, which is not a question of kind, but one of degree. Courts have the authority, but they have been far too timid in exercising it regarding excessive awards, which I think would deal with a lot of the problems in the tort area that we are talking about.

Mr. HALL. I would agree with that.

The point that I am trying to make here, and not very clearly, is that this capacity commitment by the insurers, and they can speak much more eloquently to it themselves, are being made by nonlawyers fundamentally in reaction to these two types of risk.

Mr. BERGER. This was one reason why I so strongly suggest that there be exclusive Federal jurisdiction insofar as these mass torts are concerned, particularly the Price-Anderson type. It seems to me that there is a greater likelihood that the Federal court will examine very carefully excessive verdicts than other courts would, and I think that this is one of the reasons why I am suggesting a 23(b)(1)(B) as in agent orange kind of technique be used and applied in the Federal court, exercising Federal court jurisdiction in Price-Anderson cases.

Senator MITCHELL. Thank you.

Mr. Harkins, would you like the last word, or have you said all that you want to say?

Mr. HARKINS. Your Honor, I will make the last word, it would have been a pleasure to practice in your courtroom.

Mr. BERGER. I think we all subscribe to that.

Senator MITCHELL. Thank you very much.

This hearing is recessed, we will resume at 3:30 this afternoon.

[Whereupon, at 12:28 p.m., the hearing recessed, to reconvene at 3:30 p.m., the same day.]

AFTER RECESS

[Whereupon, at 3:35 p.m., the subcommittee reconvened, Hon. Alan K. Simpson (chairman of the subcommittee) presiding.]

Senator SIMPSON. The hearing will come to order.

In the chaos of this curious arena, you have already heard the bell ring, which means that there is a rollcall vote coming in 15 minutes. I think that we can get statements. I don't want to leave it to my very capable staff, they could do it, but I don't like that, so I will be back.

We are going to go forward with our hearing. I have a few comments, but I will make those later, and they are very few. Why don't you go ahead and see if we can get testimony, and then I will go and vote and come right back.

It is nice to have you here. We have Richard Schmalz, counsel of the American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters of Farmington, CT, accompanied by Mr. Michael

J. O'Connell, manager of the Mutual Atomic Energy Reinsurance Pool; and J. Robert Hunter, president of the National Insurance Consumer Organization of Alexandria, VA.

It is very nice to have you here. As I said, this is an issue of great interest to the members of the committee, so if you would go forward, please.

STATEMENT OF RICHARD A. SCHMALZ, COUNSEL, AMERICAN NUCLEAR INSURERS AND MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS, ACCOMPANIED BY MICHAEL J. O'CONNELL, MANAGER, MUTUAL ATOMIC ENERGY REINSURANCE POOL

Mr. SCHMALZ. We appreciate your invitation to take part in these hearings. We understand you are primarily interested in learning more about how the insurance industry provides insurance for nuclear risk. We will speak primarily from the viewpoint of the domestic, the United States, portion of what is a large international market for all types of insurance for industrial risk. What we have to say is so fundamental that we don't believe there would be any disagreement from the other side of the waters.

Of all industrial activities, the generation of nuclear power surely ranks among the most difficult to insure in the private market. There is this exceedingly remote possibility of an accident, which can cause substantial off-site bodily injuries and property damage. No one can predict the extent of such injuries or damage, or what it might cost to compensate them under our tort liability system. There is no actuarial basis, and probably never will be, for determining either insurance premiums or capacity commitments.

We have stressed in previous testimony the key factors that will permit a private insurance market to function in the face of the special catastrophe risk and these inherent difficulties.

The first is that care must be taken not to saddle the nuclear industry with a cumulation of excessively heavy financial burdens. This will not automatically make plants safer or provide the public with more financial protection. In fact, in our judgment, there is a strong probability that it will have the opposite effect.

The second is that the principle of an absolute limitation on liability coupled with channeling must be retained. If not, there will be little if any nuclear liability insurance.

Third, the absolute limitation on liability must continue to apply to claims handling costs as well as to loss payments. Otherwise, the amount of insurance available will drop substantially.

Waiver of defenses must be confined to an extraordinary nuclear occurrence if we are to maintain third party liability capacity at present limits. Our tort system is notoriously prone to class action nuisance suits.

Finally, the present scope of the pool's coverage for sabotage and terrorist acts, which is exceedingly broad in relation to usual standards, represents the limit that is insurable in the private market. Broadening coverage for terrorist acts, often State supported and financed, would result in the withdrawal of capacity from the liability insurance program.

There are some positive legislative steps that could be taken that would help maintain and attract capacity: Maintain the absolute limitation on liability and claims handling costs at a reasonable amount; eliminate punitive damages in connection with claims to which the financial protection applies; and provide for consolidation of all claims under Price-Anderson in one U.S. district court.

The first step is important as a signal to the market that the Government is interested in keeping a reasonable balance between the financial risks of private industry and the Government under a well run, safe program. The last two steps would help to keep claims handling costs to a minimum, and would make more of the financial protection available to the public for the compensation of actual injuries.

I am going to skip several pages, and concentrate now on briefly summarizing our thoughts on the three specific Senate proposals, which you have asked us to consider.

S. 445 and S. 1761, unfortunately, destroy the concept of a fixed, absolute limit on liability, and undercut the principle of channeling. S. 1225, however, would be close to the original Price-Anderson concepts and is, I believe, insurable in the private market. Here, however, any increased exposure to liability for terrorist acts would not attract insurance support.

In the absence of actuarial data to support premium capacity judgments, the private insurance market must take a long range view, and place heavy reliance on some firm principles that minimize the risk of adverse selection, and cumulation of liability. This means that, for practical purposes, the market must be organized into pools, and that governments must define and limit the exposure to loss in some reasonable way. This is the case in virtually every country, other than those with collectivist economies, that are currently developing nuclear power.

The insurance industry, both here and abroad, is characterized by low concentration and intense competition for business. No one insurance company or underwriter accounts for a major share of the market. Thus, although a pool or a syndicate may sometimes exercise a lead role by reason of respect for its expertise——

Senator SIMPSON. Mr. Schmalz, excuse me, sir. I am going to have to stop you now so that I can have the testimony of Mr. Hunter, and then I must go and vote, and I will return. I promise you that your entire statement will be in the record.

If we could have 5 minutes for Mr. Hunter, and then I will go vote, after which I will come back. I think that we can develop these other things. I must do this out of courtesy so that we might hear the other gentleman.

Mr. SCHMALZ. Fine.

Senator SIMPSON. Mr. Hunter, please.

STATEMENT OF J. ROBERT HUNTER, PRESIDENT, NATIONAL INSURANCE CONSUMER ORGANIZATION

Mr. HUNTER. Thank you, Mr. Chairman.

Eleven years ago, when I was Federal Insurance Administrator under President Ford, I asked the National Association of Insurance Commissioners, could we find a way to take the nuclear exclusion off of property insurance policies in excess of the Price-Anderson limit, so we could find a way for people that live near power plants to insure their own risk.

One of the questions that we asked was: How much would it cost to remove this gap in coverage? The closest that we came to an answer was in Pennsylvania, where an insurer did offer to do that at $25 per home if the State would require that all homeowners pay that amount. That implies a $1.4 billion a year subsidy that American homeowners are paying to nuclear power by the fact that they don't have the coverage.

The insurance industry has only offered about 160 million dollars' worth of liability insurance, this is a very small amount of coverage when you compare it to their $77 billion of current surplus, for example. There is no nuclear coverage in excess of the Price-Anderson limit, so what we have, of course, is exposed citizens who might have to pay if an accident occurred—I am sure that this is one of the reasons that we have these bills that we are looking at today.

I served on an advisory committee to the National Association of Insurance Commissioners, which testified a year ago that NAIC believes that the insurance industry would better serve the public by concentrating its efforts on the property side of insurance for nuclear powerplants where it currently provides about 1 billion dollars' worth of insurance, and suggested that the insurers be eliminated from the provision of ENO type liability insurance protection.

They also concluded that the nuclear exclusion should be retained.

I have for some time thought that the insurance industry could provide much more protection. However, they have been consistent, they have not offered more at times when their economics are better, and then withdrawn when things get worse as they have in day care centers and other lines of insurance.

I have changed my position based on what I learned during the current liability crisis. I believe that the insurance industry should be excused from providing nuclear liability insurance. We would be better off as a nation focusing on and making sure that we have a system of retroactive payments from the utilities to cover the liability that is currently facing the Nation.

NICO is supporting expansion of the Product Liability Risk Retention Act in the general insurance crisis to enable businesses to group together, to self-insure just like the utilities, and to get out from under the vagaries of the insurance industry cycle. We think that the Price-Anderson Act, at least to that extent, has some advantages.

The nuclear insurers have constantly said "no" to the Federal and State policyholders in regard to expanding their role, either in terms of more liability insurance, or in terms of offering property or other kinds of insurance more generally relative to the nuclear exposure. The nuclear exclusion has been maintained so people cannot insure themselves.

Regarding the bill, we prefer an approach that would fully guarantee that injured parties would get full recompense. We would prefer the S. 1761 approach. We do not think that a fixed limit on liability affects the insurance industry's ability to offer only $160 million of liability insurance. It doesn't matter if you have a $10 billion limit or no limit, if all they offer is $160 million, it is not going to expand their ability to offer above $160 million, or detract from it. They have their own limit already internalized.

All the bills before you are an improvement over the current situation, but we would recommend that a bill such as S.1761 be adopted in that it places nuclear power on a level playing field, it allows utilities to sue any party who causes an accident under State tort law, which enhances safety incentives, and it guarantees payment of all damages to injured parties with no taxpayer involvement, while assuring that the utilities know their maximum contribution by year.

There I would end my statement.

Senator **Simpson**. Unbelievable! I appreciate that very much. I am going to go and vote, and I think that there may be another motion to table right after that, but Senator Stafford will be back. I appreciate that very much. You have been very helpful.

We will just recess for now.

[Recess.]

Senator **Stafford**. The committee will please come to order.

Gentlemen, I apologize for the fact that circumstances beyond my control kept me from being here during your statements. I do have a few questions that I would like to ask while we are waiting for Senator Simpson to get back here.

Let me start by addressing this one to both of you: Almost all property liability insurance policies in the United States contain an exclusion for damages arising from a nuclear incident. Under Price-Anderson, liability is channeled through the utility that experiences the accident. The NRC, in its 1983 report on Price-Anderson, stated that:

> No certainty exists, however, that the reduction in nuclear insurance offered through the pools would be as large as the increase in nuclear insurance available through the standard policies by virtue of the removal of the exclusion.
>
> Paradoxically, the first party coverage might be of higher quality than the insurers that would offer it have implied.

My question: What evidence is there that Price-Anderson provides greater benefits to the public than would be provided by the removal of the nuclear exclusion from property liability insurance or by the elimination of channeling?

In which ever order you prefer to answer that, if you do.

Mr. **Schmalz**. I will take a stab at it, I guess, Senator, if you don't mind.

While you were away, I made the observation, which I don't think anyone really disagrees with, that insurance for the nuclear risk in the private competitive market is one of the most difficult insurance problems that we have. You have the unpredictable event, and the unpredictable losses, and a very limited concentration of risk around approximately 100 locations, so that you have an adverse selection problem, and you have an unpredictability problem.

The only way that you can really manage that, and this is the same technique that was developed jointly and severally by experts in insurance and government around the world when the Atoms for Peace Program started to get underway in the late fifties and early sixties, is by channeling all liability to the primary sources, that is, the utility generating plants. You can then limit that liability to a reasonable amount, and supplement it with some reasonable Government assistance. This takes care of the insurance problem because it allows insurance companies to form pools, and put up their maximum capacity, channeled, as you indicated in your remarks, through the facility that is licensed, to the public.

Channeling is simply a device which has proven by experience to be very effective in that regard. There has been no drop in the quantity of capacity for liability insurance despite the Three Mile Island accident, and the ups and downs in the property casualty industry generally.

I think that you could point to that evidence as supporting the wisdom and efficiency of channeling as a means of developing insurance capacity in a difficult market.

Mr. **HUNTER**. Senator Stafford, the insurers have adamantly refused to offer insurance in excess of the Price-Anderson limits on a first party basis. I have been pushing that for 10 years, ever since I was in the Ford administration as Federal Insurance Administrator. I think that we should finally bow to their desire, but that doesn't take away my concern.

What I was trying to get at there is that we have exposed properties that are not protected today, and that means either individual innocent victims are going to have to bear that cost, or the cost will be borne by the taxpayers. Neither, I think, is the appropriate approach, and that is why I said, earlier in your absence, that I supported your bill as the appropriate approach.

Regarding arrangements to pay claims, and what-not, that can be done without a risk taking insurance mechanism even in place. The Federal Insurance Administration, for example, sells flood insurance and has a standby emergency loss adjustment capability, and has used it on many occasions. That kind of capability could be applied to this sort of a problem, with or without insurance company involvement.

I think the best mechanism is the type of mechanism you have embodied in your approach. I would even go so far as to say, maybe we shouldn't even have the insurers involved because of the cost of maintaining a bureaucracy for something that happens so infrequently. It is better, maybe, to go totally to a retroactive payment, but have a good quality service entity, ready to perform, if an event should occur.

Senator **STAFFORD**. Thank you both.

Let me ask this question. Several witnesses have testified that the impact of proposals such as the exclusion of punitive damages, and the exclusion of costs of investigating and settling claims, will be to decrease the amount of private insurance available for nuclear activities. What difference will the reduction in primary insurance supplied by the insurance industry make if the reduction can be compensated for by an increase in the amount of retrospective premium?

In a system with annual retrospective premiums, and no limit on aggregate liability, what difference does it make how much primary insurance exists?

Mr. **Hunter**. I think that it is my point, that even without any primary insurance, we have methods and techniques that can pay claims when they occur. The exclusion of punitive damages and the exclusion of defense costs are important points. We don't know what of the $160 million will actually find its way into the pockets of victims if defense costs are inside the limit.

The insurance industry has tried to take that defense cost precedent of Price-Anderson and move it, during this current liability insurance crisis, into other lines of insurance, and has met with remarkable opposition even from their insureds, risk managers, brokers, and others, and they have backed off.

I would say, again, because the $160 million includes the defense costs, and because we don't know exactly what that is worth, and that is another reason, I would say, to move just toward a retroactive, no insurance company, approach to the problem.

Mr. **Schmalz**. I would like to say that what you are assuming is that there is an unlimited supply of resources. As long as you assume that there is an unlimited supply of resources, then it doesn't make any difference. But if you come to the conclusion that supply of private resources is limited, then you must have concern for the efficiency with which you dispose of those resources.

One of the things that draws a great deal of resources from the system, potential resources, is punitive damages. There was unanimous concern, I thought, this morning, among practicing lawyers, and others outside the insurance industry, that this is a wasteful practice that should be changed, and the same is true for defense expenses. There is only so much that you can make available, and if you encourage the use of those resources, they will be used, and that draws away resources from the compensation pool.

Mr. **Hunter**. I would say just one other thing, if I could, and that is that punitive damages probably do not belong coming out of the victims' compensation fund. They should be borne by the guilty party, that is what "punitive" is supposed to mean. I don't believe that other utilities should have to pickup for blatant acts of negligence, or willful misconduct of a utility. That should come out of the utility that is being hit. Punitive is supposed to be punitive, and not insurable.

Senator **Stefford**. Thank you.

Let me ask this question. The annual retrospective premium system provides, in effect, for unlimited insurance for persons exposed to the risk of a large nuclear accident. The cost of this insurance is passed on in full to the ratepayers, and it would be almost $10 to $12 per ratepayer per year, and this cost would be incurred only if there were a major accident.

Does the insurance industry have any suggestions as to how to provide complete coverage to persons exposed to nuclear risks for a lesser amount per person, and if so, how?

Mr. **Schmalz**. I don't know that we have any suggestion for compensating people at lesser cost than a post-loss assessment. However, that is on a theoretical basis, because any kind of a private operation has to have a certain amount of overhead.

The difficulty is that you will be trying to collect unlimited retrospective premiums in times of stress. It will upset the operating experience of the utility industry. I think they are more competent to tell you how much. This will undoubtedly be reflected in increased cost of borrowing money.

So it is questionable to say that a post-loss assessment program is more efficient than a partially prefunded program, which can put money away in reasonable amounts and take care of very nearly any sort of major, but still not catastrophic, event, and these tailor the post-funding to what you really need. I think that you put less strain on an industry that way, and I think it makes a contribution to safety because we have seen how some of the private firms which have been strained financially may have short-changed safety.

Mr. HUNTER. I would just comment that I think there is no more efficient way than the post-claim assessment approach.

Senator STAFFORD. Are there any other examples, gentlemen, in which industrywide mutuals have been formed in response to the unavailability of insurance from the insurance industry? If so, do these mutuals provide for retrospective premiums or assessments from members?

Mr. SCHMALZ. Most of the mutuals that have been formed by the utility industry to deal with various facets of nuclear capacity and insurance problems do provide for retrospective assessments. Most of their capacity depends on retroactive assessments. They do accumulate some reserves, but most of it is from the retroactive assessment, so that you have that exposure, as well as the retrospective assessment potential under the Price-Anderson Program.

Mr. HUNTER. There are other examples. Right now, groups are forming mutuals. Doctors are forming mutuals. In the last liability insurance crisis, 10 years ago, we saw cities forming mutual companies and the like. Each one has a different character. Some of them do prefunding, but most of them have some kind of retroactivity, either through a dividend declaration, or an ability to collect premiums. I think each one is different, but the response of forming pools, when insurance is unavailable, is not at all uncommon.

Senator STAFFORD. I have an additional question on an issue that is raised in the written questions I had to submit this morning with respect to insurance pools. Mr. Hall's testimony also raised this issue, and I have seen it mentioned elsewhere.

I asked the pools what difference it made to the pools whether the nuclear industry had limited or unlimited liability or liability limited on an annual basis, considering that in any event, the liability of the pools would be limited to the amount of the policy they chose to provide. .

The response was that this would destroy the channeling concept, and thereby decrease the amount of available insurance. This is not what is intended, nor, I believe, contained in S. 1761. Absent amendment 770, 1761 is intended to preserve channeling, in fact, it continues channeling to the nuclear utilities on a yearly basis until all the claims are paid.

Having stated this, I will restate the question. What difference does it make to the insurance industry whether the nuclear industry has limited or unlimited liability, if the liability of the insurance industry is limited to the amount of insurance it chooses to provide?

Mr. SCHMALZ. I think that this is very similar to the question that you asked the pools to respond to, and it is a difficult question to respond to and do it justice, because it is a question with many implications.

I would refer you to the answer that we have included in the appendix to our statement, which is really the duplicate of the answer that you asked us to give.

In brief, it is because the hazard is so great and so unpredictable, and the locations are so few, that you cannot write insurance without a channeling feature and an absolute limit on liability. If you try to do it otherwise, you get cumulation of exposure from the insurers and the reinsurers. They cannot keep track of what their total liability is. They have to know that it is all in one box before they can say, I am going to risk $14, $16, $18 or $20 million on this one hazard alone. That, in essence, is the difficulty.

Mr. HUNTER. I just disagree. I think the $160 million cap that they impose on their own writing currently gives them a knowledge about what their maximum liability is. So whether you have a $10 billion cap, or an unlimited availability of coverage, I think that it doesn't matter that much to the insurance industry.

Mr. SCHMALZ. You can't give, Senator, a possible infinite, or very high number of $160 million caps, and that is what Mr. Hunter overlooks.

Mr. HUNTER. They should offer an aggregate.

Senator STAFFORD. Mr. Schmalz, your testimony states that the waiver of defenses provision must be confined to extraordinary nuclear occurrence in order to maintain present capacity because our tort system is notoriously prone to nuisance suits.

Are there any States that presently apply the rule of strict liability to all nuclear incidents? If so, how many class action nuisance suits have been brought in those States for radiological injuries?

Mr. SCHMALZ. I don't know, Senator, whether any State imposes strict liability for all nuclear incidents. There was an interesting discussion by the judge in a recent case involving radiation exposures where he pointed out that if you buy the principle that any nuclear activity and any exposure to nuclear radiation is ultrahazardous, then living in Florida, or in Denver, or flying on the Concord, or living in a brick house is an ultrahazardous activity. I think that strict liability is going to depend on the facts, Senator.

If there is an event like Three Mile Island, which was not an extraordinary nuclear occurrence, the lawyers quickly agreed that it would be strict liability, and they promptly undertook to settle the matter.

Senator STAFFORD. Gentlemen, with respect to damages from a nuclear accident which is not covered by Price-Anderson; many nuclear utilities have purchased excess property and excess insurance that involves the payment of retrospective premiums in the event of an accident.

Under the terms of these policies, as we understand it, according to figures supplied by the Nuclear Regulatory Commission, these utilities can be subject to retrospective assessments totalling $41 million in any one year. In contrast, under the present Price-Anderson system, no utility will be required to pay more than $5 million in retrospective premiums in the event of an accident.

Has the Price-Anderson system inhibited the development of retrospective assessment insurance by the nuclear industry for nuclear accidents?

Mr. **Schmalz**. I don't think so, Senator. I think the Price-Anderson system probably has encouraged the development of other ways of dealing with some of the peripheral risks associated with nuclear power beyond compensating people who may be hurt from the accident, the shortages and outages of that sort.

I don't think that Price-Anderson has done anything but suggest a method of dealing with those difficult insurance problems.

Mr. **Hunter**. I would say that it has inhibited it. The $160 million is a pittance, and I would say that it is shocking that the least insurance coverage is available to the people who are innocently exposed, as opposed to those who own the property from whence the radiation came.

I think that your question is a very important one, Senator, and I think that we ought to find ways to make sure that the people and the taxpayers are protected from risk.

Senator **Stafford**. Thank you very much, gentlemen.

Senator Simpson will be back just as soon as he votes on another vote which I understand is pending but has not started yet, as the clock obviously indicates. Apparently, there is one due at any moment, and I apologize to you for asking you to wait until he can get back.

The committee will now stand at ease, to use a military term, until he can get back.

[Recess.]

Senator **Simpson**. Thank you for your understanding of this chaotic activity. The reason that I waited is that they said we will get right to another vote in a minute. I thought, great. Then four of my colleagues really got to ripping around in it, and I didn't get to vote on another motion to table. I apologize.

I have some questions, and I know that Senator Stafford has asked some questions of both of you. I am not quite certain which questions were asked by my chairman.

Why is it that the insurance business generally, and nuclear insurers in particular, are willing to provide greater amounts of property insurance than liability insurance?

Mr. **Schmalz**. I think the answer, Senator, is that the mix between first-tier liability insurance, second-tier liability insurance, and the first-tier property insurance, and excess property insurance is quite a complicated matter. What you have is a mandatory retro-plan on the third party, second-tier coverage, which makes the utilities tend to concentrate their interest in additional private insurance on the property side.

Therefore, it makes sense for the private insurers to concentrate on the property side, and fill that gap, because I think the experience at Three Mile Island has shown that it is just as important to have enough property insurance in place to get cleanup underway right away, and to protect the public that way. You have to make priorities, and I would say that the emphasis would be placed that way.

If you take the total of the liability coverage, the $160 million from the pools plus the $30 million in contingent liability, or $190 million total, and the, roughly, $500 million for the retroplan as it now stands, you have more coverage for liability than is available on the property side in the first tier.

Senator SIMPSON. Mr. Hunter, I know that you have a schedule and you are a little pressed for time, so let me ask you to add to the question that I asked of Mr. Schmalz.

In your testimony, in quoting a statement of the National Association of Insurance Consumers, you indicated that property insurance is the kind of risk the insurance industry can best handle. Do you agree with that?

Mr. HUNTER. That is what the National Association of Insurance Commissioners said to the Congress last year, yes.

Senator SIMPSON. To what extent does that explain the difference in the amount of property and liability insurance currently available, and to what extent is the difference in property and liability insurance attributable to the rules of tort liability in the tort field?

Mr. HUNTER. I would say that there has never been much nuclear liability insurance even before the current flap about the tort law. I think that the fear is not the tort law, the fear is a nuclear accident of serious proportions. Because of the Price-Anderson rather low limits, historically, on liability, I believe that the property insurance has been what the utilities themselves have sought and have encouraged the insurers to provide.

I think that that is why we have developed a system where more property insurance is available than liability insurance, because that is what the utilities wanted, in working with the insurers, because of the limit on the liability maximum payouts.

Senator SIMPSON. It was a bit unclear to me from the testimony why the National Insurance Consumer Organization is now endorsing the elimination of private insurance participation under Price-Anderson.

To the extent that private insurance is available, and some would view the $160 million amount currently available as significant, in light, surely, of what is happening in other areas of liability insurance, why should we preclude insurers and utilities from providing and carrying private insurance before the secondary layer of retrospective assessment is triggered under the act?

Mr. HUNTER. For one thing, the insurers have been very clear that they don't want to take a substantial portion—I consider $160 million a pittance compared to their $77 billion of current surplus, or their $142 billion of current premiums. You are talking an infinitesimal amount of insurance available for nuclear liability compared to their actual capacity. If they really wanted to write this, they could write several billion easily.

They don't want to write it, and the $160 million of coverage is even illusory because you have defense costs in there, and we don't know, in a major accident, how that would play out. It might be under $100 million, or there might be very low amounts of actual coverage available to the public.

I think that it is expensive to set up a bureaucracy, and pay for it, compared to the retroactive assessment approach. I think that it would save money. I think that you can have, with the retroactive assessment approach, just as good quality service available on a no-risk basis, either through the industry or through the other providers of loss adjustment services.

Senator **Simpson**. Let me ask you, how does that compare to liability insurance for, say, medical malpractice, municipal liability, let's get it in some kind of a perspective here?

Mr. **Hunter**. The $160 million?

Senator **Simpson**. Yes.

Mr. **Hunter**. I haven't totaled it up, but they collected somewhere around $4 billion in premiums for medical malpractice last year, so obviously the coverage is significantly higher than that. They collected $142 billion in premiums overall. They have $5.5 billion of exposure just in Los Angeles for earthquakes, so they can write several billion dollars worth for a one-shot incident, and a big shake on the west coast has been predicted to be a one in two probability by the end of the century. So they can take on very high risks with big dollar amounts, and they do. They have ways of spreading that risk through reinsurance, and otherwise.

They have very major hurricane risks. Last year they paid out something over $3 billion in hurricane damage. We know that they can take on much higher exposures than they are willing to give here.

Medical malpractice, I don't know the exact limits because we would have to add the limit of every doctor, but it is certainly way, way more than $160 million. Michael Jackson, in his victory tour, had more than $160 million of liability insurance.

Senator **Simpson**. What was that?

Mr. **Hunter**. Michael Jackson, when he went on his victory tour, bought 250 million dollars' worth of liability insurance. He has more than all of the nuclear powerplants put together.

Senator **Simpson**. I am fascinated. I watch Lloyds of London, many of their senior underwriters are having their heads lopped off over there as they dabble with this kind of situation.

Mr. **Hunter**. But some of them for fraud.

Senator **Simpson**. That is true.

The issue, I think, is that we have people fleeing from coverage. We find that in Superfund. We are finding it in a lot of things. I think there is a reality here that insurance companies are not charities.

Mr. **Hunter**. No.

Senator **Simpson**. They don't ascribe to be so. We seem to sit here and do our work in an arena where we say, you will insure against this particular issue, and they will just blink and say, we don't have to do that.

Mr. **Hunter**. I agree.

Senator **Simpson**. We say, you will. I have seen Senators and staff say, you can't do that, but that is absurd, because they can do that. We are going to find that those things are going to come to pass in the United States. Do you think that those things will come to pass?

Mr. **Hunter**. I think that what we are seeing is a decisionmaking process in the general liability insurance area overall, not just here, the question being raised of insurance as a public utility, because governments require insurance before you can do many things, including the Federal Government, because banks require insurance, and so on. You can't run a business without inusurance.

So the question of insurance as a public utility is one that is going to be debated. In fact, the National Association of Insurance Commissioners has already adopted a ratemaking model based on public utility ratemaking techniques. I think that we are moving in that direction as a nation, but how fast we move probably will depend on how severe the cycle is.

Mr. SCHMALZ. May I respond to that, Senator Simpson?

Senator SIMPSON. Please.

Mr. SCHMALZ. I think Mr. Hunter is now suggesting a collectivist approach to risk assessment for nuclear power. It wasn't so long ago that he was saying that you should let the insurance companies assess the risk, and if they couldn't assess it, cut it down.

I don't think that there is any evidence to suggest that a collectivist assessment of risk is going to produce safer plants, or more protection to the public. We know what a collectivist society has done with its risk, and we have had some problems in this country with that sort of an approach.

I think there is a virtue to testing what the professional world risk assessment process produces, not to be bound by what it does, but to see what it does. To say that you are going to force companies to assume risks for certain premiums, I think is probably going to destroy whatever nuclear insurance capacity, or any other private insurance capacity that you want.

Mr. HUNTER. I have not suggested that. I suggested that if you excuse the insurance industry from writing nuclear liability insurance. I have not suggested anything eollectivist at all. What I think needs to be done in the general area, which is where I thought you were aiming your question, where your question was going to, beyond the nuclear.

A major debate is brewing over the question of how do we make sure that insurance is available because insurance has become an essential part of current life.

Senator SIMPSON. Let me ask you, Mr. Hunter, because you are going to be leaving, and I can save a couple of questions for Mr. Schmalz.

In commenting on whether Price-Anderson has inhibited the availability of liability insurance, you point out that elimination of the act might increase the amount of available insurance, perhaps up to $2 or $3 billion, but that it also might result in insurance dropping to near nothing.

Given the obvious potential for such sharp swings, would it not make sense to continue the present Price-Anderson system under which the amount of liability insurance has increased, perhaps more slowly than some may have preferred, but nevertheless steadily?

Mr. HUNTER. No; I don't think so because I think that there is no way that you can show that what you have to pay for the $160 million would be cost beneficiat compared to, say, a retroactive plan. I think you will find a retroactive plan, for this very rare type of event, will be a better way to go in terms of cost.

Senator SIMPSON. Very rare type of event is nothing I ever hear talked about when we are talking about nuclear commercial power in the United States. It is almost like it is going to be every day, and the list goes on. I am presented with continual things about transients here, and transients there.

Mr. **Hunter**. I am an actuary, I can only look at the experience. I haven't seen events every day, they are rare.

Senator **Simpson**. I am going to put you in a room with some other people who don't use the term "very rare" at all. They like to use the term "all the time."

Mr. **Hunter**. The problem with it, of course, although it is rare, it can be very large.

Senator **Simpson**. Indeed, it can. But in the midst of all of our duties, we try to develop a consensus between the extremes in what we do.

This is a question to Mr. Schmalz, but you may want to respond to this white you are here, Mr. Hunter. What impact, if any, would an unlimited right of subrogation have on the amount and distribution of nuclear liability insurance, the willingness of the insurer to settle claims, and the insurance coverage litigation?

Mr. **Schmalz**. I think Mr. Hall touched on that very specifically this morning. It would cause what liability insurance there is to disappear because, in addition to the obligation to cover the licensees on a primary basis, you would have then the obligation to cover each supplier on a secondary basis, and you don't have any money to do it with, you have put it all on the primary.

Mr. **Hunter**. Yes, I would like to comment. I think that we have already seen that there is substantial subrogation already available because after Three Mile Island, GPU sued the plant manufacturer for $4 billion. So I don't think that it would have that kind of an effect.

Senator **Simpson**. Both of you have alluded in your testimony to the situation confronting liability insurers in other areas. To what extent, then, if any, have the problems in these other areas, including the crisis in the availability of liability insurance, arisen in the nuclear liability insurance field?

To the extent that the nuclear liability insurance has been relatively steady in a predictable market, what in your view is that attributable to?

Mr. **Schmalz**. I think that is true that it has been steady. We haven't witnessed any crises with respect to availability or cost. Capacity has risen generally, progressively, in reasonable steps through very tough times. I think that that is attributable to the balance that was put into the Price-Anderson Program, and the principle of channeling with an absolute limitation on liability. Those are the keys to it.

Mr. **Hunter**. Our research for the National Association of Insurance Commissioners, when I was on the advisory committee, indicated that what we have is an unregulated cartel establishing prices for nuclear power liability insurance. You can only saturate a cloth so much, I don't think that the cycle will affect the fact that they are already getting a major amount of money, more than they need in the long run, and one of the reasons I think they should be eliminated. They are immune from the cycle because they are already so significantly overpriced.

Senator SIMPSON. You do have a previous commitment. I appreciate your staying very much.

Mr. HUNTER. Thank you, Mr. Chairman.

Senator SIMPSON. Thank you. You have been very helpful.

I have just a couple more questions for you, Mr. Schmalz. In your testimony, you note that the principle of an absolute limitation on liability coupled with channeling must be retained. If not, there will be little, if any, nuclear liability insurance.

Would you please explain what you mean by that statement, and specifically explain what the connection is between channeling and the amount of liability insurance that can be offered?

Mr. SCHMALZ. We have approximately 100 sources of risk in the United States for the number of licensed powerplants, and that is a very small number of risks compared to the total within the United States. But nevertheless, there are several hundred, even thousands of suppliers, and other peripheral service organizations that take part in the development of nuclear power through the contracts, and so forth, for the utility.

If each one of those under our tort system can be held jointly and severally liable for the whole accident, then we have several hundreds or thousands of potential insureds that we have to provide coverage for. Obviously, we cannot provide 160 million dollars' worth of coverage to each one of those. There is simply no way that you could have two suppliers involved, and go to $320 million; six involved, and go to $640 million, for example.

So the industry worldwide has settled on the idea of an absolute limitation on liability at a fixed amount, and channeling that liability to the utility as a means of encouraging maximum capacity. It is simply a device that has worked, and has allowed the market to respond without big ups and downs, and at far higher levels than it otherwise would have.

Senator SIMPSON. Without channeling, would you simply spread the $160 million over a larger number of insureds?

Mr. SCHMALZ. You wouldn't bother because if you divide it by thousands of insureds, you wouldn't have very much that you could put on each. If you spread it only over all the prime and subcontractors, that might number in the dozens, you still wouldn't have very much that you could give each one.

Senator SIMPSON. In earlier testimony today, John Harkins, and I think you were present in the room, briefly described the manner in which the insurance companies handled claims arising from the Three Mile Island accident. I thought that it was a good play between the plaintiff lawyer and defendant lawyer on Three Mile Island, and that activity.

He described that, including the payment of evacuation expenses in the days immediately following the accident. Could you please just expand a bit on how those claims were handled, and specifically comment on whether the willingness of the insurers to pay the expenses so promptly was a function of the procedures of Price-Anderson, or is that simply a routine matter for insurance companies generally in both nuclear and nonnuclear cases?

Mr. SCHMALZ. We haven't really had any experience, I don't think, in this country with the third-party liability accident of that magnitude. I can't think of one offhand. But I would say, yes, the willingness to do it was a function of the Price-Anderson system, because pursuant to that system, and the knowledge that you would have to face the possibility of responding to a disaster, a claims handling system was put into place. That never would have been done, I don't think, for other liability exposures. The system was ready to go, and operating within a matter of hours, really, after the accident.

I am sorry that Mr. Marrone is not here. He handled that personally, and he could tell you at great length how they operated that program.

Senator SIMPSON. What about, say, the handling of claims in an aircraft accident.

Mr. SCHMALZ. I don't think that you have the evacuation problem. You have a lot of people who are hurt, obviously, but you don't have the evacuation problem that you had at Three Mile Island or at Chernobyl.

Senator SIMPSON. I am just talking about the efficacy and the swiftness of settlement.

Mr. SCHMALZ. I think, with aircraft accidents, it is undoubtedly true that the effort is made to settle fast, but you probably don't have a chance to settle many of those claims before the attorneys are involved. In this case, these settlements were made without attorneys, without releases.

Senator SIMPSON. I have a couple more questions, I will submit those in writing. I have another conflict coming.

I really appreciate your being here, Mr. Schmalz, and Mr. Hunter also. It has been helpful for us as we grapple with this tough one. I practiced law for 18 years out in the real world, which has not been seen by some here, some day, I hope it will. I represented insurance companies and I represented plaintiffs in that course of time, even a cowboy who chewed another guy's ear off, after the Cody stampede parade, if you can imagine.

The reality of it is, in my mind, if we broaden it up and change things, the same as Superfund, you are going to get nailed, you don't think that it is fair, you fight. You can have the best of intentions, the protection, and the victims, and on out into space, and when the guy paying the bill, whether individually or through insurers or corporate, knows it isn't quite right, they fight.

I just would hate to see this go where I think it could go, and that is to a marvellous new gem in the crown of a citigious society, if we go on to something else rather than the basic structure of Price-Anderson. That is my thought.

Mr. SCHMALZ. We would certainly agree with that. As we said in the closing part of our statement, assuming that Congress does want to go forward with this program, the Price-Anderson program is a reasonable way to go. Your suggested amendments are certainly reasonable. Private insurers, despite what Mr. Hunter said, would be willing and would like to participate to the extent that they can.

Senator SIMPSON. Like all of them, when they get here, they are tough to resolve, or they would have been resolved before they got to the U.S. Congress.

Thank you very much for being here. Thank you, too, Mr. O'Connell.

With that, I do want to thank Jim Curtis, my very able staff director and chief counsel, right-hand man and left-hand in this area, a marvellous staff person,. and Dan Berkovitz, Christy Wallen, Kate Kimball, Charlie Richman, and Steve Hart from the various Senators 'staff on this subcommittee, the minority and the majority. They are always very attentive, and helpful, and very skilled at trying to develop the facts that give us the good basis for what we hope is responsible legislation. I appreciate that from them.

This will conclude the hearing. Thank you very much.

[Whereupon, at 4:40 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and responses to additional questions follow:]

STATEMENT OF JOHN G. HARKINS, JR.
BEFORE THE SUBCOMMITTEE ON NUCLEAR REGULATION OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
MAY 13, 1986

My name is John G. Harkins, Jr. and I submit this statement at the invitation of Senator Alan K. Simpson, Chairman of the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works. I am a partner and the Co-Chairman of Pepper, Hamilton & Scheetz, the law firm which was retained in early April, 1979 by American Nuclear Insurers to handle the litigation expected to arise as a result of the accident at Three Mile Island. That engagement has continued to this day.

I have been asked by Senator Simpson to address certain questions concerning the effectiveness of the Price-Anderson Act in light of the Three Mile Island litigation and to comment on several proposed amendments to the Price-Anderson Act which are pending before the Senate. To put these comments in context, some background information concerning claims arising out of the Three Mile Island accident may be useful.

I. Claims Arising Out of the Three Mile Island Accident.

The claims arising out of the Three Mile Island accident fall into three phases temporally and into several categories substantively.

The Three Mile Island accident began early in the morning of March 28, 1979. Almost immediately, American Nuclear Insurers ("ANI") began paying emergency claims, mainly for evacuation expenses, pursuant to 42 U.S.C. §2210(m). As contemplated by the Act, this operation was handled administratively and releases were neither sought nor obtained. While we were asked to address certain questions which arose in this phase, all of the work was performed by a team of adjusters assembled from throughout the United States on very short notice. To the credit of ANI, this phase proceeded smoothly and very professionally.

Within a short period of time after the commencement of the accident, the second claim phase began -- suits for damages were filed in various state courts and in two federal district courts. While ultimately it was concluded that significant amounts of radioactive material were not released in the accident, the litigation was not unexpected given the sensational press accounts of the accident, the limited evacuation advisory by the Governor of Pennsylvania and the confusion which existed for some period concerning the true state of affairs.

In part as a consequence of the omnibus insuring provision of the Act, 42 U.S.C. §2014(t), implemented through the "Facility Form" insurance policy specified at 10 C.F.R. §140.91 Appendix A, the insurance pools providing the omnibus insurance decided to engage one law firm to defend all persons who might be sued in "public liability" litigation arising out of the accident. To the extent that some of the claims raised possible coverage questions, these were put to one side through mutual reservation of rights agreements with the cooperation of the various defendants, thus further facilitating a single defense effort with respect to all claims.

In this second litigated phase of the claims experience, it was recognized immediately that the transactional costs would be large despite the "single defense," unless creative procedural solutions were sought. These in turn depended on the availability of a single forum in which all the litigation would go forward, carefully controlled by one judge. After consultation with Professor Paul J. Mishkin, one of the country's leading authorities on federal subject-matter jurisdiction, it was determined that federal jurisdiction should lie and all state court actions were immediately removed to the United States District Court for the Middle District of Pennsylvania (the "Middle District"), there to be joined with actions already filed in the Middle District by some plaintiffs. All of the cases within the Middle District were shortly assigned to the Honorable Sylvia H. Rambo, who in turn assigned Magistrate John Havas to assist her in the administration of the litigation.

I will not describe here all of the procedural mechanisms utilized to expedite the litigation in this phase. Two, however, are especially significant. First, with the cooperation of David Berger and other counsel for plaintiffs, it was determined that a Rule 23(b)(3) class action was appropriate for the disposition of all economic loss claims by individuals and businesses within twenty-five miles of the reactor site, the largest area which was believed to have been affected by the accident. These included additional claims for evacuation related expenses, lost wages, business interruptions and the like. In addition, most of the individual plaintiffs claimed that they had a right to recover for the expense of future medical examinations. This type of claim was also considered appropriate for Rule 23 treatment.

In early 1981, all of the foregoing Rule 23 claims were settled. All claims for economic loss within twenty-five miles of the reactor were settled for $20,000,000. The claim for medical examination expenses was rejected, as such, but an alternative $5,000,000 Public Health Fund was created and placed under the supervision of the Middle District to make grants to aid research into the effects of the accident, to support emergency planning and monitoring, to support public education in regard to radiation and to support research into the health effects of low level ionizing radiation.

After the settlement of the Rule 23 claims, a large number of personal injury claims, plus several other types of claims referred to below, remained pending. Almost all of the personal injury claims included a claim for severe emotional distress, an unsettled area of the law in Pennsylvania, as well as claims for other adverse health effects. Most of these plaintiffs also sought punitive damages. In response to these claims, we proposed, and the District Court adopted, a plan for their expeditious resolution. Specifically, we proposed a pretrial order under Rules 16 and 42 of the Federal Rules of Civil Procedure pursuant to which claims for compensatory damages would be bifurcated from those for punitive damages, with the latter being held in abeyance. As to the compensatory damage claims, we proposed that no plaintiff would have to establish a basis for liability -- that is, negligence, strict liability or the like. Each plaintiff, with respect to his or her compensatory damage claim, would only have to establish causation of injury in law and in fact and the amount of his or her damages, if any. This proposal, when adopted by the District Court, obviated the need for extensive and expensive fault related discovery and permitted the parties to focus on the nature and effects of the accident as they related to causation of injury and damages. Without going into detail, this approach facilitated the ultimate settlement of almost all of the personal injury claims for amounts which, from the defendants' perspective, recognized only the severe emotional distress claims, given the uncertainty in the law of Pennsylvania in this area.

The settlement of the personal injury claims left three other types of claims in this phase of the accident claim experience. First, there was a purported class action by electric rate payers residing more than twenty-five miles from the reactor for recovery of increased electric rates said to be attributable to the accident. Second, there were a series of suits by tourism related businesses located beyond twenty-five miles from the reactor claiming recovery for lost tourism business. And third, there were suits for recovery of accident related expenses by the Commonwealth of Pennsylvania and by various local government units. The latter cases were settled, but the others mentioned have been resisted.

The third phase of the accident claim history dates from, but is only partly related to, a decision by the Court of Appeals for the Third Circuit that subject matter jurisdiction does not lie in the federal district court in these cases on a so-called "federal question" basis. Initially it did so as to those actions commenced after the Nuclear Regulatory Commission ("NRC") determined that the accident did not constitute an Extraordinary Nuclear Occurrence ("ENO"). Stibitz v. General Public Utilities Corp., 746 F.2d 993 (3d Cir. 1984), cert. denied, 105 S. Ct. 1187 (1985). Subsequently it extended its holding to actions commenced prior to the ENO determination. Kiick v. Metropolitan Edison Co., No. 85-5351, slip op. (3d Cir. Feb. 19, 1986). The several actions which were pending in the Middle District were then returned to various Pennsylvania state courts.

Almost contemporaneously with the exodus of the TMI litigation from the Middle District to various state courts, a "second wave" of TMI litigation began, in effect, the third phase of the TMI claim history. Personal injury actions, seeking both compensatory and punitive relief, were filed in various Pennsylvania trial courts as well as in the United States District Court for the Southern District of Mississippi and in the Mississippi state courts. The actions in the Mississippi federal court named only two TMI defendants and rested jurisdiction on the basis of diversity of citizenship. All of the Mississippi actions were filed there to take advantage of that forum's extended statute of limitations.

Notwithstanding the lack of federal subject matter jurisdiction based on a federal question, the following procedural steps have been taken to again coordinate the TMI litigation. First, the actions filed in the federal court in Mississippi, or removed thereto on the basis of diversity jurisdiction, have been (or are in the process of being) transferred to the federal court in the Middle District of Pennsylvania. However, the personal injury actions pending in various Pennsylvania county courts have presented a more difficult problem of coordination and consolidation. There exists no state procedural mechanism by which a judge sitting in one county may consolidate actions which are pending in other counties. Therefore, defendants asked the Pennsylvania Supreme Court to exercise its extraordinary "King's Bench" powers.[1] Pursuant to those powers, the Pennsylvania Supreme Court has ordered that all personal injury actions arising out of the accident at TMI be brought in or transferred to the Dauphin County Court of Common Pleas sitting in Harrisburg, Pennsylvania. A single judge, the Honorable William W. Lipsitt, has been assigned to all pending actions in the Dauphin County Court and he and Judge Rambo, to whom the cases transferred from Mississippi federal court have been assigned, have agreed to coordinate their procedures.

---

[1] The "King's Bench" powers of the Pennsylvania Supreme Court are those powers that existed in 1722 in the English Court of King's Bench. They have been rarely invoked in contemporary litigation.

As a result of the foregoing, there are now pending in the Dauphin County Court of Common Pleas more than 100 personal injury actions brought by summons or complaint on behalf of approximately 2000 plaintiffs. Most of these actions have been consolidated for pretrial purposes. Presently pending in federal court in the Middle District of Pennsylvania are approximately 50 companion actions on behalf of approximately 1200 of the same state court plaintiffs which were transferred from Mississippi. In addition, the "tourism loss" cases are pending in the Lancaster and Adams County Courts of Common Pleas in the Pennsylvania state court system.

Once again, a pretrial order has been entered in the actions pending in the Dauphin County Court of Common Pleas which eliminates the need to prove fault and which bifurcates all issues relating to the recovery of punitive damages and once again defendants have sought summary disposition of the electric rate recovery action and the "tourism loss" cases. Defendants' motion for summary judgment in the electric rate recovery action was granted on March 28, 1986. The "tourism loss" motions remain undecided in Adams and Lancaster Counties.

Presently pending before the Dauphin County Court of Common Pleas are proposals for the manner in which the cases will be pretried and, ultimately, tried. The first trials are likely to begin within the next year.

II. The Three Mile Island Accident Has Tested the Price-Anderson Act Under Circumstances Not Contemplated At Its Inception.

The remarkable thing about the Three Mile Island accident is that despite the fact that relatively little radiation was released, it has spawned an enormous amount of litigation. There are at least three reasons for this.

First, while in the end the accident was not life threatening (and was not an ENO according to the NRC), it engendered enormous confusion and sensational accounts. A substantial evacuation took place and much concern was expressed about the accident.

Second, the widespread acceptance of nuclear power was undermined by the accident and a very vocal anti-nuclear movement developed in the Harrisburg area as well as elsewhere. In the

Harrisburg area, those opposed to nuclear energy focused their efforts on preventing the restart of the undamaged Unit No. 1 at Three Mile Island. That controversy went on for several years and kept the whole question of nuclear accidents and their consequences very much in the minds of the public in the area.

Third, the tort system has changed radically since 1957. The bases for bringing tort actions have been expanded, the defenses have been narrowed, recoveries for compensatory damages, especially pain and suffering, have grown considerably larger and punitive damage claims have become a regular part of most tort complaints. Meanwhile, with expanded discovery, all litigation has grown more expensive.

Against this background, the steady flow of new Three Mile Island personal injury complaints is probably understandable in today's terms, but was probably not contemplated in 1957, at least in the case of an accident not amounting to an ENO.

Nevertheless, as revealed below in the answers to the specific questions put by Senator Simpson, the Act has worked well, subject to two serious problems. The first of these is the jurisdictional problem. If a non-serious accident can spawn thousands of claims in the judicial system, transactional costs will be very high unless some means is provided to consolidate that litigation in one court, as is the case with an ENO.

Through good luck (and hopefully some good lawyering), the Three Mile Island litigation has again been brought under some coordination. There is no certainty that such good fortune would pertain in another accident and Congress ought to make sure that a single federal court is available to deal with a similar situation, should it ever occur. Otherwise, the Act, as presently interpreted by the Court of Appeals for the Third Circuit, invites vast multiplication of transactional costs to no one's advantage except, perhaps, the lawyers.

Second, the question of the possible availability of punitive damages in "public liability" actions renders application of the Act uncertain and unstable. One of Congress' original purposes was to assure to victims of a nuclear accident a more certain and effective compensation system than would otherwise have been available. The "financial protection" provisions of the Act, the omnibus insurance provision and the carefully linked definitional sections are designed to make compensation available as surely and as quickly as possible to those who need and deserve it. Indeed, the Supreme Court, in upholding the constitutionality of the Act in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), did so by describing the Act as an alternative compensation system which provided a fair substitute for the state law remedies which it replaced. 438 U.S. at 93.

A fair and prompt compensation system is destabilized when litigants may be able to seek punitive damages, as well as compensation. If punitive damages are available, who gets what becomes almost a matter of chance, subject to the enormous variation in state laws relating to punitive damages. The "financial protection" mechanism was not designed for this purpose (indeed punitive damages were extremely rare in 1957) and the omnibus insurance provision would lose its effectiveness if punitive damages were available. Punitive damages are often justified as a means of regulatory safety by punishing those who, in the eyes of a jury, depart substantially from some norm. But the remedy is too blunt and too whimsical and the standard too loose and subject to too much variation to be an appropriate means of dealing with the very serious and very technical business of regulating nuclear reactor safety. That subject should be addressed by making certain that the NRC fulfills its role in this area. Moreover, reactor operators have a heavy incentive to conduct themselves in a safe manner since the property damage they may suffer in the event of an accident is enormous and only partly insurable. More is said about this subject below.

III. Responses to Specific Questions

1. Based upon your experience in the litigation of public liability claims arising out of the Three Mile Island accident, and in comparison to your experience with other "mass tort" litigation, to what extent, if any, did the Price-Anderson Act contribute to (or detract from):

(1) efficient conduct of the litigation;

(2) minimizing the "transaction costs" associated with the litigation;

(3) minimizing insurance coverage litigation;

(4) minimizing the problems associated with litigation involving multiple plaintiffs;

(5) minimizing the problems associated with litigation involving multiple defendants;

(6) minimizing delays in the compensation of claimants;

(7) more fully compensating claimants beyond what they would have been likely to recover in the absence of Price-Anderson;

(8) minimizing the burdens on the court system;

(9) easing the claimants' burden of proof with regard to the standard of care, causation and damages;

(10) encouraging settlement, rather than litigation, of claims; and

(11) encouraging insurers to make emergency payments at the time of the accident, prior to establishment of fault.

This first set of questions, with one exception, essentially relate to various facets of the same issue: How does the Price-Anderson Act litigation experience compare in its efficiency with mass tort litigation outside the Price-Anderson context. The short answer to this question is that the Act has contributed substantially to the efficiency of Three Mile Island litigation in comparison with other mass tort litigation, subject to the jurisdictional problem noted above.

"Mass tort" litigation is ordinarily plagued by a variety of problems, most of which have been avoided in the Three Mile Island litigation due to the existence of the Price-Anderson Act. In most mass tort cases there are multiple defendants with many separate insurance and liability problems. There may or may not clearly be coverage for the particular claims made; there may be coverage for some claims but not for others; there may be substantial deductibles or retentions; there may be significant underinsurance problems; there may be differing insurers for differing time periods; and there may be differing interests as between primary and excess carriers.

Collectively these problems tend to paralyze the litigation process. Counsel for each party feels obligated to crossclaim against everyone else in the litigation (or at least reserve the party's right to do so) and to exhaust all potential third-party rights by bringing into the litigation anyone else who may be implicated in the causation of the loss. Once all the players are assembled it is often difficult, if not impossible, to adopt a coordinated approach to the litigation process. Something as mundane as scheduling a deposition can be an exhausting effort; anything as adventuresome as initiating a settlement discussion can be a nightmare since each party feels it necessary to jockey for position in relation to every other party. When settlement discussions have commenced, as much time (if not more) is frequently devoted to arrangements for sharing among defendants as is devoted to settlement with the plaintiffs; and when fewer than all claims are being settled, great attention is required to the forms of releases and positioning for collateral proceedings. Finally, once the issues with the plaintiffs are resolved, either by settlement or trial, there may be follow-on controversies between insurers and insureds, between primary and excess carriers, and between jointly or commonly liable defendants.

To date, the Price-Anderson Act has made it possible to avoid or minimize those inefficiencies and transaction costs. As noted above, due to the omnibus insurance contemplated by the Act there has been a unitary defense with no crossclaims, third-party claims or the like. A unitary defense has meant that scheduling has been greatly simplified, decisionmaking has been centralized, and collateral issues have been eliminated. When federal question jurisdiction seemed secure, the coordination, consolidation and settlements described earlier were speedily accomplished.

To date there has been no insurance coverage litigation associated with the Three Mile Island public liability actions. Were it not for the Price-Anderson Act one would have expected that the magnitude of the risk would have provoked substantial coverage disputes resulting in several complaints or spin-off litigations.

The Price-Anderson Act, during the period when it was regarded as supporting federal question jurisdiction, was integral to the ability to consolidate multiple plaintiffs' cases in federal court, eliminating the problems frequently encountered when actions are pending on behalf of multiple plaintiffs in several different court systems. Unless Congress acts to restore federal court jurisdiction, only time will tell how much inefficiency will be imposed on future Three Mile Island litigation as that population migrates and matures.

The exception noted earlier to the "efficiencies" list in this subset of questions is subquestion (7), "more fully compensating claimants beyond what they would have been likely to recover in the absence of Price-Anderson." On one level, it can be said that the Price-Anderson Act to date has not affected the extent of compensation, since there has been no indication that the limit of liability would be reached. On a more conceptual level, the Price-Anderson system is clearly an improvement over the situation which applies in other contexts. An assured source of funding is provided, bankruptcy problems are avoided, the federal court has the power to establish the order of payments should the sufficiency of the fund be in doubt, and the Congress has indicated that additional funds may be made available in the event of a very severe accident. Moreover, the omnibus insurance provision centralizes decision making and minimizes transaction costs, thereby assuring that a higher proportion of available monies will be available to deserving claimants.

Finally, we think that special mention should be made of the subject of subquestion 9, easing the claimants' burden of proof. Nothing in Price-Anderson or in the Three Mile Island litigation has affected the claimants' burden of proof with regard to causation of injury and damages The omnibus insurance feature of Price-Anderson did facilitate an easing of the claimants' burden of proof as to the standard of care by eliminating that issue in the Three Mile Island context, even though that accident was not determined to be an "extraordinary nuclear occurrence." We would expect that responsible counsel could make differing judgments about other accidents, depending on the particular circumstances of such other accidents or events.

2. What effect, if any, would modification or elimination of the channeling feature of the Price-Anderson Act (also referred to as "omnibus coverage") have on each of the areas identified in question number one? In addition to any general comments, please comment specifically on the impact of Amendment No. 770 to S.1761 (copy attached) in each of these areas. [Amendment No. 770 provides that nuclear utilities -- other than the one at which the accident occurred -- that pay the retrospective premium may seek reimbursement through the judicial system from the utility at which the accident occurred and from any other party that may be liable under applicable state tort law. In addition, the amendment provides that the utility at which the accident occurred may also seek reimbursement from any other party that may be liable.] To what extent, if any, would the approach taken in settling, adjudicating, and paying claims following the Three Mile Island accident have been any different, in your judgment, under an approach such as that proposed in Amendment No. 770?

As a practical matter, elimination of the channeling feature of the Price-Anderson Act, or the creation of subrogation rights for participants in the retrospective premium layer, would destroy the efficiencies discussed in response to Question 1.

If the same insurance did not apply in the same way to the liability of anyone who might be liable, all the usual difficulties would arise in which each defendant would be represented by separate counsel, each of whom would feel obligated to attempt to transfer any liability to some other defendant. The focus of the litigation would shift from whether claimants deserve compensation to whether one specific defendant, compared to another one, is more or less free from responsibility. The entire direction of the process would be altered, and the goal of just compensation of meritorious claims would be compromised.

Similarly, if subrogation were present, then a greatly different process would be necessary. Settlements would be far less likely since in deciding to settle any given claim the payor would have to be confident of the ability to prove in a later case the prudence both of the decision to settle at all as well as the reasonableness of the particular amount itself. Since counsel assisting in making the settlement judgments would likely be a witness in subsequent subrogation suits, exceptionally difficult issues would be present as to conflicts, attorney-client privilege, attorney work product and the like. The defendants themselves, knowing they were likely to be targets in subsequent subrogation actions, would insist on separate representation, would likely be as uncommunicative as possible with other defendants and with the insurers, and the practical result would be as though there were no omnibus insurance at all, so far as the efficiencies of the claim process are concerned. In short, if it appeared even remotely possible that the initial layer of insurance would be exceeded, the administrative difficulties would be enormous.

3. What impact, if any, would exclusion of the costs of investigation, settlement, and defense of claims from the amount of financial protection available under the Price-Anderson Act have on the settlement, adjudication, and payment of public liability claims following a nuclear accident and, specifically, on the areas identified in question number one?

If the costs of investigation, settlement and defense were excluded from the cap, they would have to be imposed either on the defendants or the insurers and indemnitors. If the costs were imposed on the defendants but the cost of adverse judgments remained with insurers or indemnitors, we would suspect there would be neither investigation nor defense, and substantial adverse judgments. If the cost of investigation and defense were imposed on the insurers but excluded from the liability cap, it would be difficult to attract private insurance capacity, and it must be expected that the level of investigation and defense would not be proportionate to the need for it. By this I mean that the greater the number of claimants and the more diverse the merits of those claims, the more real need there is for investigation and defense. At the same time, however, there is no economic return on those expenses if the limit of liability is in any event likely to be exceeded.

Plane geometry tells us that a triangle is the simplest stable structure. The present system has such stability, since it includes the three elements of investigation and defense, settlements, and judgments. If any one of those three sides of the triangle is removed from the structure, the integrity of that structure is gone.

4. What impact, if any, would a prohibition on the payment of punitive damages out of the financial protection available under the Price-Anderson Act, along the lines of the approach taken in S.1761, have on the settlement, adjudication, and payment of public liability claims following a nuclear accident and, specifically, on the areas identified in question number one? [Under S.1761, a court would be allowed to award punitive damages against any party, under applicable state tort law, including the utility suffering the accident, but any such damages awarded would be paid directly by that party and could not be paid out of the primary or secondary layers of financial protection.]

Punitive damage claims, unfortunately, have become a routine demand in personal injury complaints. If punitive damages were determined to be available in public liability actions but excluded from the financial protection system, I believe that most if not all the litigation efficiencies described above would be lost.

Each defendant would have a personal stake requiring separate representation and separate positioning as to every issue that might conceivably affect any punitive damage judgment. The defendants would not be expected to cooperate with each other on issues affecting only compensatory damages, since admissions or declarations on these issues cannot with confidence be separated from other aspects of the case.

Standard insurance law is that if any claim in a case is covered, the insurer has the duty to defend all claims made against its insured in that case. If that rule were to apply to Price-Anderson litigation, the limit of liability would be eroded by the cost of defending against punitive damage claims, even though such claims were not payable from the financial protection funds. If that rule were determined not to apply to Price-Anderson litigation, would two firms be needed for each defendant, one to represent it with respect to punitive damage claims and one with respect to compensatory damage claims by those same plaintiffs?

Regardless of how these and related questions might be answered, it can confidently be said that once the self-contained nature of the present system is destroyed, the efficiencies achievable under the present system would be lost. As is true with respect to the subjects of question two, the focus of the litigation would not be the compensation of meritorious claims but the assessment of blame. By itself, and in circumstances anything like the Three Mile Island accident with the huge losses borne by the licensee, that would appear to be a singularly unproductive exercise.

Question 5

5. Please provide whatever additional comments or views you have on the three legislative proposals currently pending before the Subcommittee (copies and explanations attached). Specifically, please comment on the impact, if any, that each of these proposals will have on the settlement, adjudication, and payment of public liability claims following a nuclear accident?

My comments on these proposals (apart from those reflected above) will be brief, but can be supplemented during the oral testimony. In numeric order, starting with S. 445, I understand the principal thrust of this proposal to be the elimination of the limit of liability found in existing law. In the case of accidents that do not threaten to exceed the financial protection available, this proposal would not affect the settlement, adjudication or payment of public liability claims. However, if punitive damages are not controlled in some fashion, or in the case of accidents in which the total of financial protection funds might be exceeded, this proposal would have all the adverse efficiency impacts I have described. By removing the "ENO" distinction this proposal simplifies fault issues, since they are removed as a matter of law, except as to possible punitive damage claims. By substituting "nuclear incident" for "extraordinary nuclear occurrence" in Section 170n, federal question jurisdiction would be secured, which is a highly desirable method for dealing with the multiplicity of jurisdictions typically selected by a multiplicity of plaintiffs.

As to S. 1225, the principal features of that bill would not appear to affect, positively or negatively, any of the issues I have discussed. This is unfortunate since federal jurisdiction would secure important litigation efficiencies, as described earlier.

Finally, concerning S. 1761, the invitation to assess punitive damages but exclude them from the financial protection system is counterproductive for all the reasons I have mentioned. Like S. 1225, S. 1761 misses the opportunity to afford federal jurisdiction for all public liability litigation.

RESPONSE TO
QUESTIONS FOR JOHN G. HARKINS, JR.
PEPPER, HAMILTON & SCHEETZ
FROM SENATOR ALAN K. SIMPSON

1. If you had a choice, at the outset of the Three Mile Island Litigation, between seeking recovery under Price-Anderson or pursuing a traditional tort remedy--and you had to make a binding election at the outset to pursue one course or another--, which route would you advise potential plaintiffs to pursue and why?

In 1979, the better choice would have been to seek a recovery under the Price-Anderson Act, although it is probable that most plaintiffs' lawyers did not perceive themselves at that time as being required to make a choice. The Act appeared to be comprehensive in scope, the legislative history of the Act favored an expeditious resolution of meritorious claims, the ENO provision, if applicable, would lessen the burden of proving a claim by eliminating significant defenses and the likelihood of a judicial attitude sympathetic to recognition of meritorious claims, if such claims could not be settled, was high. At the time, the jurisdictional question seemed capable of resolution in favor of a single federal forum which, in turn, would increase the likelihood of an efficient and expeditious determination of claims. Finally, at the stage of recovery, the Price-Anderson Act held out the significant advantage that resort would not have to be had to the assets of the defendants themselves, with whatever problems of collection that might pose. Instead, the financial protection arrangements of the Act assured that a ready source of funds, up to the limit of liability, would always be available, thus avoiding any post-judgment remedy problems entirely.

Assuming a choice, the choice facing a prospective personal injury claimant was probably a more difficult one than the choice facing a plaintiff seeking only a recovery for alleged injury to "property." As the traditional tort remedy was then evolving, it held out the possibility of large recoveries for intangible damages such as pain and suffering. And, perhaps more importantly, it held out the potential for punitive damages, the prospect of which increases the leverage of a claim even in a settlement context, to the benefit not only of the prospective plaintiff but also of his or her contingent fee lawyer. It was not then settled (and it is not now settled) to what extent, if at all, punitive damages are permitted under the compensation system of the Price-Anderson Act, a subject again referred to in question 4 below. Moreover, it might have been thought in 1979 that if jurisdiction would lie in a state court, a state court might be less concerned with the complete fulfillment of Congressional purposes than a federal court might be, given the broader experience of federal courts with the necessity of molding their actions to insure complete implementation of

Congressional objectives. If it is assumed, therefore, that there was in fact a real choice between pursuing a recovery under the Price-Anderson system and pursuing a traditional tort remedy and if it is further assumed that that choice had jurisdictional significance as well as some substantive implications, then a prospective plaintiff claiming personal injuries might have been better advised to opt to proceed outside the Price-Anderson system.

The problem in 1979, however, was that no court had construed the Price-Anderson Act in the aftermath of a reactor accident. The only authoritative construction of the Act appeared in the constitutional context in the Supreme Court's decision in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). The legislative history of the Price-Anderson Act rather clearly signalled Congress' intention that state law should serve as the source of applicable rules of decision with respect to such issues as liability and causation. It was also apparent that the Supreme Court and the legislative history each had emphasized the compensatory nature of the Price-Anderson system (the Supreme Court had interpreted it as an alternative to the state tort law remedies which the Act replaced, 438 U.S. at 93). In this context, a source of applicable rules of decision analysis would (as defendants have urged) require a court to limit recovery under the Act to compensatory damages. At the same time, the jurisdictional question was not clear in 1979, even though a legitimate argument seemed available in favor of federal question jurisdiction in the federal courts.

But despite the uncertainty as to subject matter jurisdiction, it was widely believed in 1979 (and today) that Congress intended the Act to be comprehensive in scope, a result accomplished through its carefully interwoven definitions and operative provisions. It was largely for this reason, as noted above, that the presence of a choice between pursuing a remedy under the Price-Anderson Act and pursuing a traditional tort remedy was not apparent. Rather, from a plaintiff's perspective, the real question, aside from jurisdiction, was the extent to which a court could be persuaded that the Price-Anderson system was not limited to recovery of compensatory damages but would also permit punitive damages. In all other important respects, if the source of the applicable rules of decision defining liability and causation were to be drawn from state law in any event, there would be no operative difference between a suit under the Price-Anderson Act and a suit seeking a traditional tort remedy.

2. In your testimony, you commented on the problems associated with multi-defendant law suits where "mass

tort" litigation is involved. Please comment on whether it is possible to divorce entirely the effects of multi-defendant litigation by first litigating public liability claims, and then having the various defendants sort out their differences in a wholly separate subrogation action?

The direct answer to this question is that one cannot "divorce" the effects of multi-defendant litigation by first litigating public liability claims and then having the various defendants sort out their differences in a wholly separate context (whether by subrogation, cross claims or third party claims, as required).

The omnibus insuring provision of the Price-Anderson Act and the channelling of any recoveries into the financial protection fund operate, as indicated at the hearing on May 13, 1986, to streamline the defense of Price-Anderson litigation (assuming that punitive damages are either not permitted or would be paid from the financial protection fund, including that portion provided from the federal treasury). The ability to streamline the defense would be lost if every defendant had to be conscious of the fact during the initial public liability phase that each of its positions would have to be weighed in terms of the effect it might have on the second stage of litigation. Every defendant would have to have separate counsel since each would be entitled to the assurance that its position was being separately protected in light of the impact that any first round action might have in terms of the second round.

It is probably fair to say that the necessity of adding separate law firms to represent each defendant would not merely have an additive effect on transactional costs; rather, the experience is that transactional costs, including the costs imposed on the judicial system itself, become significantly larger at each step of the way as the number of separately represented parties increases. In the end, then, the result of the two round proposal would be to add cost to the first round and to add a costly second round of litigation, without any positive effect on making compensation available to victims.

Of course, this poses the ultimate issue: What is Congress' intent expressed through the Price-Anderson Act? From the legislative history, it seems clear that heretofore Congress has been concerned with developing a comprehensive plan to ensure the availability of compensation to those suffering losses attributable to a nuclear accident. It makes little sense in this context to sacrifice the economic efficiencies inherent in the present structure.

3. To what extent does insurance coverage litigation between insurers for multiple defendants play a major role in the ability of plaintiffs to recover in the normal tort context where multiple defendants are involved, and is this a problem under the Price-Anderson Act, as it is currently structured?

Coverage litigation among insurers plays some role but probably not a major role in the ability of plaintiffs to recover in the normal tort context where multiple defendants are involved. The principal impact of such litigation is to insert an extra series of concerns into the decision making process with respect to the underlying litigation and its possible resolution. Delay can result and, presumably, delay is associated with added cost. Of course, the ultimate outcome of the coverage litigation may determine the pool of funds available in a given situation which, in turn, may itself have an impact on the underlying litigation. Even where there is no actual coverage litigation in progress, the possibility of subsequent coverage questions being pressed injects some tension into the relationships among the insureds and the several carriers which may be involved.

To date there has been no coverage litigation of any kind as an offshoot of the Three Mile Island litigation. As noted at the May 13, 1986 hearing, such coverage questions as have arisen have been the subject of mutual reservations of rights letters designed to facilitate the unitary defense consistent with the omnibus insuring provision of the Act. There has been no effect upon any plaintiff's claim.

It might be noted in passing that the Act does provide for the Attorney General of the United States to take over the defense of existing claims should the third layer of coverage under the financial protection plan be approached. Should a situation arise in which the third layer were to be approached (a situation which could at least conceptually arise in the Three Mile Island litigation but which would not arise in the event of another nuclear accident so long as the second layer carries the amount of financial protection up to the limit of liability), some "coverage" questions might arise which would have an impact on the litigation and the manner in which it is carried forward on behalf of the defendants.

The only other real concern which arises under the Act as it is presently structured involves the punitive damage claims. In Three Mile Island, the coverage question with respect to such claims has been mutually reserved. If, as has been urged by defendants, punitive damages have no part in "public liability" litigation under the Price-Anderson compensation system, the problem becomes moot.

4. In your testimony, you commented on the issue of punitive damages. Please expand on how you think punitive damages should be handled and, specifically, comment on what impact, if any, a separate cause of action for punitive damages, beyond Price-Anderson's financial protection, would have on the litigation and settlement of claims under Price-Anderson?

As the Act is presently constituted, punitive damages should have no role in "public liability" litigation under the Act. Moreover, were a separate cause of action for punitive damages to be provided through an amendment to the Act, many of the beneficial aspects of the present system would be lost. Litigation and settlement of claims under the Price-Anderson Act would be adversely affected.

If, as is made clear numerous times in the legislative history, Congress intended through the financial protection system required under the Act to provide a ready fund for the compensation of victims of a nuclear accident and channelled all recoveries into that fund, punitive relief would only be justified if it furthered the same Congressional goal. Yet injection of punitive damage recoveries into public liability litigation would thwart the primary goal of making funds available to deserving victims in an orderly, prompt and rational way. And by definition, such awards have nothing to do with compensation. The usual justification under state law for allowing windfalls to particular plaintiffs and their attorneys is that punitive relief imposes a penalty against the assets of the defendant which will serve as a deterrent or as a "sting" as some writers have described it. But under the Price-Anderson Act, the penalty would be recovered not from any defendant's assets but from the financial protection fund. By channelling recoveries into the financial protection fund, Congress made a deliberate decision to promote fair and efficient compensation as its primary objective in public liability litigation. And by creating such a system, it rendered wholly irrelevant the underlying purpose of state law punitive damage remedies. Congress had undoubted power to make this choice and it did so for good reasons.

If punitive damage awards were permitted within the Price-Anderson system, the unitary defense would be impossible, fault would be an absolutely essential issue in every case in which punitive damages were sought and the efficiencies and economies achieved in the Three Mile Island litigation would be negated.

That same result would follow were a separate cause of action permitted for punitive damages outside the Price-Anderson Act. In such event, again the unitary defense would be impossible and every defendant would have to be concerned at every step with the implications of any action taken in terms of its subsequent exposure to a punitive damage claim. Settlement of public liability claims would be substantially impeded. In the real world of settlements, there can be no easy distinction between that portion of a claim which is compensatory and that portion of a claim which may involve punitive damages. Plaintiffs and insureds alike expect the insurer to pay enough money to extinguish an entire claim and yet the insurer recognizes that it is being presented with demands for amounts in settlement which probably exceed the fair value of a claim viewed in purely compensatory terms. The process of reaching a settlement becomes infinitely more complicated even in those cases where it is clear that the insured must put up some separate sum of money to extinguish the punitive aspect of the claim. The grave result of the punitive damage problem in other mass tort litigation has been to drive those defendants who can no longer tolerate the process into the bankruptcy courts.

When considering the question posed here, Congress must reexamine its intention with respect to the Price-Anderson Act. Congress succeeded in 1957 and through subsequent amendments in creating a self-contained, efficient means of addressing a major social concern--the concern about how to channel funds to victims in the event of a nuclear accident. If it is to reinject punitive damage awards into this process, Congress must recognize that it is abandoning its original purpose and is opting to throw the subject of nuclear accident litigation back into the mass tort arena which has been demonstrated to be economically and socially inefficient.

One final point might be made. It is sometimes said that punitive damages are a good way to regulate safety. While it is questionable that post hoc "safety regulation" by a jury is an efficient way to accomplish this purpose (economists have demonstrated that it is not), it is certainly a poor way to regulate safety in the nuclear industry. If Congress, through its chosen administrative agency or agencies, cannot impose an adequate safety system on the use of nuclear power, then nuclear power ought to be abandoned or it should be returned to its status as a government monopoly, a status which it occupied prior to the adoption of the Price-Anderson Act. Passing off the burden of safety regulation to juries in the charged emotional atmosphere which necessarily exists after a nuclear accident would be an affront to rationality.

5. To what extent, in your view, are transaction costs going to increase, as we move in the direction of "fault-based" compensation under Price-Anderson--and particularly with a system that allows unlimited subrogation--and do the advantages of broader subrogation pay off from the standpoint of compensating accident victims?

Moving in the direction of "fault-based" compensation under Price-Anderson, particularly with a system that allows unlimited subrogation, would necessarily increase transactional costs. Even if the actual fault issues were to be litigated only at the subrogation stage, costs, as noted earlier, are imposed on the first round process. Each defendant in the first round will naturally seek to protect itself against admissions or omissions which might operate to its detriment in later stages of the proceedings. Adding these costs has no pay off from the standpoint of compensating accident victims and, indeed, probably would impede the compensation process.

In economists' terms, the transfer of assets from one party to another is only warranted if a more efficient allocation of assets is thereby produced, taking into account any transactional costs required to effect the transfer. Classic subrogation litigation might (although it is questionable) serve the goal of efficiency in allocation of resources if it effects a reallocation which more perfectly equates with the pre-accident estimates of risk and risk shifting for which payments have been calculated and made. No such purpose would be served in the Price-Anderson context.

6. Please comment on the constitutionality of proposals to impose liability retroactively--either through a right of subrogation, the imposition of punitive damages, or any of the other proposals to change the liability for those reactor licensees covered under the existing Price-Anderson law?

Legislation which would impose liability retroactively on licensees or "any other person who may be liable for public liability", 42 U.S.C. §2014(t), would raise a substantial constitutional question. The comments which follow are abbreviated and do not represent a full analysis of the many nuances implicit in the question posed.

Congress is generally entitled to regulate the conduct of private parties even though some additional burdens may be imposed upon those parties retroactively. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Pension Benefit Guarantee

Corp. v. R.A. Gray & Co., Inc., 467 U.S. 717 (1984). The propriety of the retroactive impact of such legislation is judged by a due process analysis which focuses on the rationality of the relationship between the legislative purpose to be furthered and the means adopted to further that purpose. A "particularly harsh and oppressive" law would be declared unconstitutional, see Welch v. Henry, 305 U.S. 134, 137 (1938), as would an act that was arbitrary and irrational. See Pension Benefit Guaranty Corp., supra at 733; Turner Elkhorn, supra at 17.

A more stringent test applies, however, to an attempt by Congress to alter substantially a contractual relationship between the government and private parties. Lynch v. United States, 292 U.S. 571 (1934); National Railroad Passenger Corp. v. Atchison, 105 S.Ct. 1441, 1455 n.24 (1985). The government is bound by its contractual undertakings and, on due process grounds, it may not, except in extraordinary cases, abrogate the relationship created by such arrangements.

One of the two principal purposes of the Price-Anderson Act was to provide an inducement to private industry to enter into the business of the generation of nuclear power. The inducement was created by shielding the assets of any person found liable in a public liability action. Collection of all such judgments is channeled into the financial protection fund backed up by the government's indemnity. To implement this system, every licensee has been required to enter into an indemnity agreement with the NRC (earlier, the AEC). That contract is pivotal to the channeling mechanism and the ultimate limitation on liability and it applies not only to the licensee itself but to all others who may be found liable in a given accident situation.

Where an entire industry has been created on the basis of a federal statute and implementing contractual relationships with the government, imposition of liability retroactively would probably not survive constitutional scrutiny. This would be true whether the extension of liability was created through a right of subrogation or through an imposition of liability to punitive damages.

As noted previously, this is an area of great complexity. If the Subcommittee wishes a further analysis of the problem, the writer would be glad to provide such an analysis.

RESPONSE TO
QUESTIONS FOR JOHN G. HARKINS, JR.
PEPPER, HAMILTON & SCHEETZ
FROM SENATOR ROBERT T. STAFFORD

1. One witness has testified that the Price-Anderson Act could be improved by "put[ting] controls on attorney's fees to prevent the lawyers from taking too large a share of the financial resources which will be provided by utility ratepayers and perhaps by taxpayers."

(a) Do you agree?

(b) Should any recommendation for controlling attorneys' fees apply to the fees of both defense lawyers and plaintiff's lawyers? Do you have any specific recommendations?

There is insufficient empiric evidence to support an attempt by Congress to legislate an absolute standard for fees in Price-Anderson litigation. However, it would be appropriate for Congress to direct the judiciary to review the reasonableness of fees in public liability actions. The courts are accustomed to doing so in a variety of contexts.

In a class action, for example, the courts already are charged with reviewing and determining the fees to be awarded to successful plaintiffs' counsel and standards have been established to guide such review. In the Three Mile Island litigation, even before any fund was created from which an award of fees would be appropriate, Judge Rambo required plaintiffs' lawyers and defense counsel to submit to her monthly summaries of their ongoing activities in order that she could examine the expenditures of time by counsel from the standpoint of reasonableness and efficiency.

The principal complaint which has been aired in the press as it relates to lawyers' fees has concerned contingent fee agreements. Some states have adopted rules (but not Pennsylvania) which limit the percentage of fee in such matters. A direction by Congress that individual agreements be subject to a review for reasonability should be sufficient to prevent abuses in this area. Since defense counsel fees are charged against the financial protection fund, there is no reason why such fees should not also be reviewed for reasonability.

2. Mr. Harkins, you have commented that excluding punitive damages from Price-Anderson coverage, as proposed in S. 1761, would result in a loss of "most if not all" of the litigation efficiencies of the present system. You stated that defendants would not be expected to co-operate with each other because of fear that any adverse admissions would be used against them in the non-Price-Anderson litigation over punitive damages. Mr. Hall also testified that excluding punitive damages will destroy the channeling concepts of Price-Anderson.

Under the present system, claims for on-site damages are not covered by Price-Anderson.

Is there any evidence that the exclusion of on-site damages and the possibility that admissions made during litigation of off-site damages could be used in actions for on-site damages resulted in a loss of efficiency in resolving claims that are covered by Price-Anderson? Do you believe that any exclusion for punitive damages would cause a different impact upon the Price-Anderson system than the exclusion for on-site damages?

Litigation involving claims for on-site damage has the same potential for a loss of efficiency in resolving public liability claims as does separate litigation for punitive damage recoveries. The problem was avoided to a large extent in the Three Mile Island litigation by the decision of the District Court to adopt defendants' suggestion that the plaintiffs, in order to effect a compensatory damage recovery, need not establish fault or other basis of liability. Rather, each plaintiff would only have to establish proof of legal and factual causation and the amount of damages, if any, and the recoverability of each kind of damage as a matter of law. The subject became moot when the on-site damage litigation was settled out of court.

The lesson of the Three Mile Island litigation is that so long as the extraneous litigation is only among defendants, there is some possibility for working out a means of preserving the effiencies contemplated by the Price-Anderson Act in public liability actions. That same potential does not exist in the case of extraneous punitive damage litigation since no defendant would concede away the need for a plaintiff to prove the degree of fault necessary to establish a basis for punitive damages.

3. The testimony before the Committee has raised a concern over the inability to consolidate claims in a single federal district court in the absence of an extraordinary nuclear occurrence (ENO). I understand there may be constitutional problems in simply conferring federal court jurisdiction on state tort law claims. One possible way to avoid the constitutional issue might be to provide for a substantive rule of decision for the federal court to apply.

If we abolish the extraordinary nuclear occurrence test for determining federal court jurisdiction, then should we abolish the ENO test for the underlying substantive law as well and provide for strict liability for all nuclear incidents? If the ENO is abolished to overcome various procedural barriers to full and efficient compensation, then shouldn't similar substantive barriers be abolished as well?

In an Article III sense, it is generally correct to state that Congress could not confer federal subject matter jurisdiction over what would simply be a state tort law claim. That general proposition, however, is not dispositive of the jurisdictional issue under the Price-Anderson Act.

First, it is not necessary for Congress to provide the substantive standards for recovery in a given action in order to support a grant of subject matter jurisdiction over that action. As has been evident since Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), the scope of the "arising under" jurisdiction provided in Article III of the Constitution is broad enough to encompass litigation involving any subject matter with which Congress has concerned itself pursuant to its Article I powers. In Osborne and in the companion decision in Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824), it was held that the "arising under" power extended to suits in which a law of the United States forms no more than "an ingredient of the original cause." Osborne, supra at 823.

It is also true under Article III that the lower federal courts have only such jurisdiction as Congress chooses to confer upon them. To what extent Congress chose in the Judiciary Act of 1875 and its later codification to extend the full range of "arising under" jurisdiction to lower federal courts was initially answered expansively in the Pacific Railroad Removal Cases, 115 U.S. 1 (1885), and later more narrowly in American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257 (1916). See also Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). See generally, T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965).

But whatever the scope of the general grant of jurisdiction under the Judiciary Act, it is also clear that when Congress has the power to enact substantive rules in a given field, it also has the power to draw controversies which may implicate construction or effectuation of its enactment or policies into a federal forum. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Beeler, 293 U.S. 367 (1934).

Congress has chosen in the Price-Anderson Act to exercise its power in the field of claims arising in the context of a nuclear reactor accident. In such a context, and without the need to enact substantive rules declaring the standards for recovery, Congress undoubtedly can draw such litigation into federal courts within the Article III "arising under" grant. Thus, the fact that liability issues, for example, would be governed (by Congressional choice) by state law is no impediment to federal jurisdiction under Article III.

If it were thought important to articulate further the basis for Congress' decision to extend federal jurisdiction to all litigation involving "nuclear incidents", it would suffice for Congress to note that the rules governing the causes of action in "public liability" litigation shall be incorporated from state law as federal rules of decision, so long as and to the extent those rules are not inconsistent with other provisions or policies in the statute. This is precisely the path selected in the Federal Tort Claims Act (although not required for jurisdictional reasons). See Laird v. Nelms, 406 U.S. 797 (1972).

Thus, federal question jurisdiction does not require that Congress provide for strict liability in all nuclear incident cases. At present, the ENO test serves two purposes. One is to trigger the waiver of certain defenses and the other is to signal a specific grant of federal subject matter jurisdiction. The point of the discussion above is to demonstrate that there is no constitutional significance in the waiver of defenses aspect of an ENO insofar as it relates to the jurisdictional issue. Quite to the contrary, jurisdiction could be conferred on the federal courts without any waiver of defenses provision, whether in the case of an ENO or otherwise.

The question of waiver of defenses should thus stand on its own merits in the light of the various possible situations which might emerge in practice. One can imagine that relatively minor occurrences involving some slight off-site releases of radiation may nevertheless spawn litigation in today's tort world. It seems quite unnecessary in such a case that all "defenses" be waived. Obviously, the matter is one of degree and it may well be that the present definition of an ENO should be reexamined and adjusted, if thought necessary. There will still be some cases, however, wherever the line is drawn, that will be sufficiently insignificant so as not to call for a waiver of defenses. Drawing such a line has nothing to do with jurisdiction.

STATEMENT OF DAVID BERGER

Mr. Chairman, distinguished members of this Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works:

The events resulting from Three Mile Island in March 1979, the ongoing nuclear accident at Chernobyl, as well as the expiration date of the Price-Anderson Act dictate Congressional action now with respect to re-enactment of the Price-Anderson Act in some form.

Congressional action along the lines I suggest will eliminate the type of morass experienced in the adjudication of many mass tort claims in the resolution of claims arising from nuclear accidents. It will show judges, lawyers and victims of mass torts there is a better way to resolve the disputes that inevitably arise when thousands are harmed by a single occurrence or by a series of similar industrial acts or omissions.

In short, Congressional enactment of my proposals will fairly and timely compensate victims of nuclear harms and at the same time prevent already clogged court dockets from getting worse, if there should unfortunately be more accidents at nuclear power facilities.

Understandably, the Subcommittee has requested me to address certain issues as part of my written testimony. I will attempt to do so as briefly as possible.

Based upon my experience in the Three Mile Island litigation and comparing my experience with other mass tort litigation, I respectfully suggest the following principles be clearly articulated in the legislation program to re-enact and/or modify the Price-Anderson Act:

1. Compensation for Nuclear Harm

There is simply no rational basis for distinguishing between an "extraordinary nuclear occurrence" and a "nuclear incident."

Any harm caused as a result of the release of radiation in the operation or cessation of operation of a nuclear facility or in connection with the construction, improvement or demolition of such facility (hereinafter called "compensatory nuclear harm") shall be compensated under the Price-Anderson Act (or its successor).

The victims who suffer either economic harm or personal injuries shall, in principle, under circumstances set forth above be compensated fully for such harms. Such full compensation shall be subject to a proviso that should the degree of liability be such as to directly threaten the financial viability of the nuclear power industry, Congress would act to set the highest possible limit on compensation short of industry insolvency.

2. Federal Jurisdiction

The federal courts shall have exclusive jurisdiction and shall be the exclusive forum for resolving any disputes arising out of claims for such compensatory nuclear harms. There should be no requirement for a jurisdictional amount in controversy and service of process should be national in scope.

3. Federal Law Shall Govern Nuclear Harm Disputes

The law to be applied in the resolution of such disputes shall be federal law as enacted by Congress, and interpreted by the federal courts and not the law of each state or territory. This will insure uniformity of decisions and the application of a single standard with respect to circumstances which implicate important national policies and which are of national significance.

4. Substantive Provisions of Controlling Federal Law

A. Strict Liability

Anyone suffering nuclear harm shall be compensated for such harm without proof of negligence or fault.

B. Causation

Those seeking compensation will still have to prove they suffered such harm and the extent thereof.

1. Economic Harm

The federal courts are well equipped to hear and determine disputes relating to such economic harm as business losses, wage and evacuation losses, dimunition in the value of real and personal property and other damages (physical or economic) to property.

2. Personal Injury

The federal courts are also well equipped to hear and determine disputes relating to personal injury including latent and non-latent consequences of nuclear plant accidents, involving radiation releases.

3. Class Actions

The federal courts shall be empowered to certify all inclusive mandatory class actions to govern all disputes arising out of claims for compensation for radiation related harm suffered as a result of an accident at a nuclear facility or the operation thereof.

The provisions of Rule 23 of the Federal Rules of Civil Procedure shall be applied. In the event that more than one class action is brought, the Multidistrict Panel shall designate the particular federal court which will preside over the Mandatory Class Action pursuant to the provisions of § 1407 of Judicial Code.

4. Settlement Plan

Once the class action has been certified, the Federal Court shall require lead counsel for the claimants to submit a Settlement Plan ("S.P."). The S.P. shall contain the following features:

a. Claims Handling Facility ("CHF")

All claims will be evaluated, in the first instance, with limited court appeal, by a claims handling facility which will be established to hear and determine the amount if any, to be awarded to each claimant. This CHF shall be adequately staffed with an Executive Director and necessary computer and other technology.

b. Statutes of Limitation

(i) Economic Harm

A 2-year statute of limitations should be enacted. In the event that certain economic harm claims may be latent in nature and will not have been manifested within 2 years of the accident event, claimants shall have 2 years from the time of discovery of the economic harm within which to file suit.

(ii) Personal Injuries

A statute of limitations should be enacted with respect to personal injuries and it shall be triggered by the date the person knew or should have known that he or she had suffered cancer or other injury claimed to be caused by accidental radiation releases at a nuclear facility.

c. Punitive Damages

The federal court shall hear and determine:

1. whether any punitive damages shall be awarded;
2. the amount thereof; and
3. who shall pay and in what amount.

All such punitive damages, if any may be awarded, shall be paid to the Treasury of the United States.

d. Attorneys' Fees

The federal district court shall award attorneys' fees, in an aggregate amount as is fair and reasonable under the circumstances; in the first instance based upon a sliding scale percentage of the total settlement fund applied in a manner not to create a windfall but at the same time not to discourage timely, expeditious disposition of the claims.

Such awards shall not be disturbed on appeal except for clear abuse of discretion.

e. Indemnity or Contribution

The federal court shall refer disputes relating to indemnity or contributions to the CHF.

Such disputes shall in no way hinder, or delay the processing of claims by the CHF or the distribution of funds to victims whose claims have been duly allowed.

A federal economic law of contribution and indemnity shall be applied by the CHF as articulated by the appropriate federal court.

5. Financing

The Act should permit full compensation for harm in principle, subject to a proviso that a limitation on liability shall be applied such that the financial solvency of the nuclear power industry shall not be substantially impaired.

A fund shall be established to collect, invest and be ready to pay over such amounts as may be needed. Assuming 115 reactors in the United States and its territories this fund can be made up along the lines suggested in Amendment No. 770 as introduced by Senator Stafford.

Now to address the specific questions addressed to David Berger:

1. Based upon your experience in the litigation of public liability claims arising out of the Three Mile Island accident, and in comparison to your experience with other "mass tort" litigation, to what extent, if any, did the Price-Anderson Act contribute to (or detract from) --

(1) efficient conduct of the litigation;

(2) minimizing the "transaction costs"associated with the litigation;

(3) minimizing insurance coverage litigation;

(4) minimizing the problems associated with litigation involving multiple plaintiffs;

(5) minimizing the problems associated with litigation involving multiple defendants;

(6) minimizing delays in the compensation of claimants;

(7) more fully compensating claimants beyond what they would have been likely to recover in the absence of Price-Anderson;

(8) minimizing the burdens of the court system;

(9) easing the claimants burden of proof with regard to standard of care, causation, and damages;

(10) encouraging settlement, rather than litigation, of claims; and

(11) encouraging insurers to make emergency payments at the time of the accident, prior to establishment of fault.

1.(1) Unlike in other "mass tort" litigation, the Price-Anderson Act facilitated the efficient conduct and disposition of TMI related property damage litigation because it permitted class actions to be filed in federal court which resulted in the consolidation of all such actions before a single judge, the filing of a single class action and the ultimate disposition of the action by way of settlement.

1.(2) Assuming that the term "transaction costs" refers to costs of litigation, such costs were greatly limited since there was one consolidated action, which ultimately disposed of a large number of claims with a single award of counsel fees.

1.(3) I have no personal knowledge and respectfully refer you to my distinguished co-panelist, John G. Harkins, Jr., Esquire.

1.(4) See 1.(1) above.

1.(5) See 1.(1) above.

1.(6) The vast majority of claims were administered and paid within 3 years of the accident. We estimated that 100,000 households were affected. 40,000 households requested claim forms and ultimately over 15,000 claims were filed, almost 12,000 of which consisted of evacuation and wage loss claims. The remaining approximately 3,000 claims consisted of claims for losses in business operations and for dimunition of the value of real estate.

Wage and evacuation claims were paid within a year of the settlement of the litigation. Other claims involving business losses and real estate losses were considerably larger on a per claim basis, much more complicated, and have taken considerably longer to adjudicate. However, compared to what would have transpired had case by case adjudication been required, the record of TMI claims administration is quite good. For example, only a small number of personal injury claims out of the total number filed have been disposed of. Indeed, checks aggregating over $2 million, a partial payment of almost 1000 business loss claims, have been mailed today.

1.(7) Because of the use of a single, class action mechanism many received compensation and quite likely many of these would never have received any compensation whatever because of expenses of litigation, delays, removals and deaths from other causes.

1.(8) The TMI litigation was a model of judicial efficiency and economy.

1.(9) With respect to wage loss and evacuation claims, all claims were paid in full with minor adjustments for obviously invalid elements of claims (such as evacuations to such far away places as Hawaii).

With respect to other claims, the basis of all claims has been evaluated and where recognized the only remaining issue in the claims administration was the amount of damages. This approach was the result of the use of a claims handling facility on an across the board basis as opposed to a case by case adjudication.

1.(10) The affirmative answer to this is self-evident.

1.(11) There was such a payment. However, it is not clear what effect the Act had on encouraging such payment. Also, the payment was highly limited geographically and, consequently, largely inadequate. It was supplemented by the class action claim handling facility which administered the claims.

2. What effect, if any, would modification or elimination of the channeling feature of the Price-Anderson Act (also referred to as "omnibus coverage") have on each of the areas identified in question number one? In addition to any general comments, please comment specifically on the impact of Amendment No. 770 to S.1761 (copy attached) in each of these areas. [Amendment No. 770 provides that nuclear utilities -- other than the one at which the accident occurred -- that pay the retrospective premium may seek reimbursement through the judicial system from the utility at which the accident occurred and from any other party that may be liable under applicable state tort law. In addition, the amendment provides that the utility at which the accident occurred may also seek reimbursement from any other party that may be liable.] To what extent, if any, would the approach taken in settling, adjudicating, and paying claims

following the Three Mile Island accident have been any different, in your judgment, under an approach such as that proposed in Amendment No. 770?

2. Assuming that the term "omnibus coverage" refers to the provision of the Act which requires recovery against any and all defendants (including non-utility defendants) from the Price-Anderson Fund, the creation of a single fund greatly simplifies recoveries by victims since all liability would be covered by and paid for from the Fund. This means that injured parties would only have to sue one among multiple defendant parties, since such suit would trigger applications of the fund.

To the extent that Amendment No. 770 eliminates the limit on liability, the amendment would facilitate full compensation in a single proceeding and thereby also reduce the need of resort to multiple lawsuits to achieve compensation with obvious concomitant impact on the judicial system.

Claims over against other defendant parties, while increasing the scope and complexity of litigation, would not affect compensation of the public claims, as long as payments from the Fund were not delayed by resolution of third party liability.

An approach such as proposed in Amendment No. 770 would have had a substantial adverse effect on payment of claims if the Fund from which such payments were made had been subject to cross-claims and had necessitated the resolution of the cross claims before settlement of the class action.

3. What impact, if any, would exclusion of the costs of investigation, settlement, and defense of claims from the amount of financial protection available under the Price-Anderson Act have on the settlement, adjudication, and payment of public liability claims following a nuclear accident and, specifically, on the areas identified in question number one?

3. No defense costs should be payable out of the Fund because it could give an incentive to the defendant parties to drag out and delay the resolution of litigation.

4. What impact, if any, would a prohibition on the payment of punitive damages out of the financial protection available under the Price-Anderson Act, along the lines of the approach taken in S.1761, have on the settlement, adjudication, and payment of public liability claims following a nuclear accident and, specifically, on the areas identified in question number one? [Under S.1761, a court would be allowed to award punitive damages against any party, under applicable state tort law, including the utility suffering the accident, but any such damages awarded would be paid directly by that party and could not be paid out of the primary or secondary layers of financial protection.]

4. Provision of punitive damages, subject to the discretion of a federal court, would enhance resolution of the litigation prior to trial, since settlements would almost never, except in situations involving the most outrageous conduct, include punitive damages. Thus, the risk of punitive damages would constitute a substantial inducement to settle prior to trial.

5. Please provide whatever additional comments or views you have on the three legislative proposals currently pending before the Subcommittee (copies and explanations attached). Specifically, please comment on the impact, if any, that each of these proposals will have on the settlement, adjudication, and payment of public liability claims following a nuclear accident?

5. Stafford Amendment

The principal advantage of the Stafford form of language is that it recognizes the principle of full compensations for harm. Also, it proposes the seemingly good idea that there be cross claims among defendants and utility parties in an effort to assign individual responsibility.

The principal disadvantage of the Stafford Amendment is the retention of the ENO terminology and its failure to focus on the procedural and choice of law issues addressed in my proposal. The Stafford Amendment also eliminates punitive damages which under certain circumstances could serve a useful policy objective, particularly if the scope of the Price-Anderson Act is expanded to include all radiation related accidents at nuclear power plants.

The Hart Amendment

The Hart Amendment is similar to the Stafford Amendment in that it recognizes the principle of full compensation for harm. It also has the added feature of permitting recoveries for punitive damages.

The Hart Amendment suffers from the same defects as the Stafford Amendment, in that it fails to recognize the substantive/procedural issues focused on in the Berger Plan.

Simpson-McClure Amendment

While Simpson-McClure recognizes a legitimate need to limit liability of the nuclear industry so as not to put it out of business, it does so in a fashion which, in the context of re-enactment of the Price-Anderson Act might substantially threaten full or even substantial compensation of victims.

Like the other proposals, the Simpson-McClure Amendment fails to address the substantive/procedural issues raised by the Berger Plan.

Please accept my thanks for your courtesy and patience.

DAVID BERGER

May 13, 1986

2. HOW DOES YOUR EXPERIENCE WITH THE LITIGATION OF THE THREE MILE ISLAND CLAIMS COMPARE WITH YOUR EXPERIENCE IN THE LITIGATION OF ASBESTOS CLAIMS? WHAT DO YOU SEE AS THE PRINCIPAL ADVANTAGES OF EACH SYSTEM, FROM THE PERSPECTIVE OF CLAIMANTS WHO ARE SEEKING TO RECOVER FOR INJURIES?

It is quite obvious that a consolidated disposition of claims on an across-the-board basis is superior in almost every respect to a claim-by-claim adjudication. Except for my own case presently pending as a class action with respect to asbestos in elementary and secondary schools, School Asbestos Litigation, and the disposition of all asbestos personal injury claims recently pending in the Eastern District of Texas, Jenkins v. Raymark, asbestos claims have been litigated and disposed of on a case-by-case basis. This has been a disastrous experience for parties associated with this type of litigation, particularly the judicial system. It is the principal reason why we were able to establish a class action in the school case.

The Three Mile Island case, so far as property damage is concerned, was, on the other hand, litigated on an across-the-board basis.

The only possible advantage to claimants from case-by-case adjudication is if a particular claimant is one of the few lucky ones whose claim is disposed of. Where delay is not a factor, and all other things are equal, such as litigation posture and strength of the parties (which they never are), single adjudication may be more effective (assuming a strong case on the merits)

RESPONSES OF DAVID BERGER
BERGER & MONTAGUE
TO QUESTIONS FROM
SENATOR ALAN K. SIMPSON

1. IF YOU HAD A CHOICE, AT THE OUTSET OF THE THREE MILE ISLAND LITIGATION, BETWEEN SEEKING RECOVERY UNDER PRICE-ANDERSON OR PURSUING A TRADITIONAL TORT REMEDY--AND YOU HAD TO MAKE A BINDING ELECTION AT THE OUTSET TO PURSUE ONE COURSE OR ANOTHER--WHICH ROUTE WOULD YOU ADVISE POTENTIAL PLAINTIFFS TO PURSUE AND WHY?

At the time of the accident, March, 1979, it would have been and was more advisable to seek a recovery under the Price-Anderson Act than under state law. This conclusion applies to the class of injured persons as a whole, not necessarily to individual plaintiffs.

The principal reason is that, at the time, the Price-Anderson Act held out the prospect of a single, consolidated suit in federal court under Rule 23, F.R.Civ.Pro. involving all injured parties, while under state law such a class action might not have been possible. It is our view that a single suit, realizing judicial economies, was the best way to proceed in the interests of all parties to the litigation including plaintiffs, defendants and the courts. Since a class action was more feasible at the time in federal court, the federal statute was more attractive.

This answer, of course, assumes that no problem of a limitation on liability existed which, as things turned out, did not.

(Response of David Berger to Senator Simpson's
Question 2 cont'd.)

and faster. Also, punitive damages may still be available, before they run out, if thousands of claims are involved.

In the presence of delay, disparity in litigation resources, limited solvency of the defendants, economies of time and effort, judicial economy, across-the-board adjudication is preferable even from the point of view of individual claimants.

3. IN YOUR TESTIMONY, YOU COMMENTED ON THE PROBLEMS ASSOCIATED WITH MULTI-DEFENDANT LAW SUITS WHERE "MASS TORT" LITIGATION IS INVOLVED. PLEASE COMMENT ON WHETHER IT IS POSSIBLE TO DIVORCE ENTIRELY THE EFFECTS OF MULTI-DEFENDANT LITIGATION BY FIRST LITIGATING PUBLIC LIABILITY CLAIMS, AND THEN HAVING THE VARIOUS DEFENDANTS SORT OUT THEIR DIFFERENCES IN A WHOLLY SEPARATE SUBROGATION ACTION?

This question appears to involve something of a misconception. When I used the term "multi-defendant lawsuits", I had in mind the traditional meaning of the term, namely litigation involving one or more defendants. The question seems to ascribe a slightly different meaning, namely litigation between more than one defendant to determine ultimate responsibility between the defendant parties.

There is no doubt that an ability to bifurcate the proceeding between plaintiffs v. defendants and defendant v. defendant may be desirable and necessary to permit speedy compensation of claimants. Such bifurcation is possible under present rules of procedure. Normally, recovery by claimants should not be adversely affected or delayed by crossclaims between defendants.

It is also true that crossclaims may be required to go forward simultaneously so as not to prejudice defenses of certain defendants.

Therefore, bifurcation, in principle, ought to be left to the discretion of the trial court. To the extent that there should be legislation in this area, the legislation should simply codify the above principle: namely, discretion of the trial judge to bifurcate the proceedings in the interest of justice.

4. TO WHAT EXTENT DOES INSURANCE COVERAGE LITIGATION BETWEEN INSURERS FOR MULTIPLE DEFENDANTS PLAY A MAJOR ROLE IN THE ABILITY OF PLAINTIFFS TO RECOVER IN THE NORMAL TORT CONTEXT WHERE MULTIPLE DEFENDANTS ARE INVOLVED, AND IS THIS A PROBLEM UNDER THE PRICE-ANDERSON ACT, AS IT IS CURRENTLY STRUCTURED?

Normally, in one-on-one, non-mass tort litigation, this situation is not a problem because the insurance company steps into the shoes of the defendant and the interests coincide.

In mass tort litigation, interests between insurers and defendant-tortfeasors often conflict for a variety of reasons. In such cases, disposition of claims by claimants can be adversely affected in the extreme. Asbestos related litigation is a good example.

Under the Price-Anderson Act, this problem does not appear to arise unless the tortfeasor attempts to make claims under the Act, in which case it could compete for recoveries from a limited fund with the claimants. Theoretically, under the present act, this could take place and could present a real problem.

The legislation should be modified to make clear that claimants would have priority in any recovery. Furthermore, clean-up expenses (such as decontamination, etc.) should take priority over any financial harm or property damage to the utility.

5. IN YOUR TESTIMONY, YOU COMMENTED ON THE ISSUE OF PUNITIVE DAMAGES. PLEASE EXPAND ON HOW YOU THINK PUNITIVE DAMAGES SHOULD BE HANDLED AND, SPECIFICALLY, COMMENT ON WHAT IMPACT, IF ANY, A SEPARATE CAUSE OF ACTION FOR PUNITIVE DAMAGES, BEYOND PRICE-ANDERSON'S FINANCIAL PROTECTION, WOULD HAVE ON THE LITIGATION AND SETTLEMENT OF CLAIMS UNDER PRICE-ANDERSON?

The problem of punitive damages raises two related issues: First, a limited fund of punitive damages stemming from the financial solvency of the tortfeasor or a "legal" limit placed on the aggregate amount of punitive damages in order to avoid excessive punishment. Second, assuming either an actual or legal limit, an unfairness in the distribution of punitive damages among claimants, arbitrarily favoring those who sue first and win and reduce their claims to judgments.

Ideally, punitive damages, which do have a place in the law concerning operation of nuclear power plants, ought to be rationally established to serve legitimate policy purposes of punishing past wrongdoing if appropriate, and providing adequate deterrence to wrongdoing in the future. Moreover, any punitive damages assessed ought to be distributed equitably among claimants or otherwise distributed in the national interest. Since an award of punitive damages presupposes full compensation for harm and since punitive damages are imposed as a penalty, I favor the payment of punitive damages to the United States Treasury.

A separate action for punitive damages beyond the Price-Anderson legal liability limitations has both pros and cons.

(Response of David Berger to
Senator Simpson's Question 5 cont'd.)

The principal pros are that, outside the framework of Price Anderson, the actual wrongdoer would be subject to a punitive award rather than the industry collectively which contributed to the Price Anderson fund. This has much to recommend since experience suggests that many accidents at nuclear facilities result from human error and bad management. A separate action would, therefore, assist in promoting better management and a greater concern for safety. It also would assist in settlement of claims arising from nuclear accidents, since it would increase the leverage of claimants and decrease the incentive to litigate.

The principal con is the specter of unlimited liability which would bankrupt the wrongdoer.

6. TO WHAT EXTENT, IN YOUR VIEW, ARE TRANSACTION COSTS GOING TO INCREASE, AS WE MOVE IN THE DIRECTION OF "FAULT-BASED" COMPENSATION UNDER PRICE-ANDERSON--AND PARTICULARLY WITH A SYSTEM THAT ALLOWS UNLIMITED SUBROGATION--AND DO THE ADVANTAGES OF BROADER SUBROGATION PAY OFF FROM THE STANDPCINT OF COMPENSATING ACCIDENT VICTIMS?

I believe, that as long as types of claims of whatever character--whether they be of injured parties or between defendants and insurers inter se-- are consolidated in a single proceeding or very few proceedings, then transactions costs (i.e. costs of litigation) can be kept within reasonable bounds. However, since a sorting out of ultimate responsibility in mass tort occurrences in an advanced industrial society involving major technological systems is liable to be complex and protracted, compensation to victims should not be delayed or tied to ultimated resolution of fault. Also, insurance companies should not be permitted to delay compensation while they litigate, in many instances frivolously, over the fact or extent of coverage. The priority should be: (1) victims and (2) decontamination; then (3) defendants and insurers. Within the context, I am not opposed to attempting to further reasonably subrogation rights. I might also suggest the establishment of a special court of experienced judges to litigate nuclear accidents, such as established in connection with the bankruptcy of the rail system in the Northeast which led ultimately to the creation of Conrail under the Regional Rail Reorganization Act.

7. PLEASE COMMENT ON THE CONSTITUTIONALITY OF PROPOSALS TO IMPOSE LIABILITY RETROACTIVELY--EITHER THROUGH A RIGHT OF SUBROGATION, THE IMPOSITION OF PUNITIVE DAMAGES, OR ANY OF THE OTHER PROPOSALS TO CHANGE THE LIABILITY FOR THOSE REACTOR LICENSEES COVERED UNDER THE EXISTING PRICE-ANDERSON LAW?

A change in the Price-Anderson Act now which applies to future events would not involve any problem of retroactivity, even though it would apply to utilities regulated under the existing legislative scheme. The only way a problem of retroactivity might arise would be to change the law with respect to an accident that has already taken place. Since, fortunately, there are presently no such occurrences extant or in litigation, the issue of retroactivity is wholly theoretical.

RESPONSES OF DAVID BERGER
BERGER & MONTAGUE
TO QUESTIONS FROM
SENATOR ROBERT T. STAFFORD

1. One witness has testified that the Price-Anderson Act could be improved by "put[ting] controls on attorney's fees to prevent the lawyers from taking too large a share of the financial resources which will be provided by utility ratepayers and perhaps by taxpayers."

(a) Do you agree?

(b) Should any recommendation for controlling attorneys' fees apply to the fees of both defense lawyers and plaintiff's lawyers? Do you have any specific recommendations?

The comment has no application whatever to Price-Anderson Act litigation and, indeed, given the structure of the Act, is illogical. The major advantage of Price-Anderson is or should be to permit consolidation in a single forum and a single proceeding. Such consolidation will eliminate any alleged problems associated with attorneys' fees or, indeed, costs of litigation, because it will or should eliminate redundant individualized litigation and the accompanying proliferation of lawyers. Moreover, if class actions are utilized, attorneys' fees are established by judicial supervision and, hence, are not subject to abuse.

My principal recommendation would be to strengthen the Price-Anderson Act to require single, across-the-board adjudications through class actions and legislative direction from Congress that the proceedings be streamlined and expedited and that fair, reasonable and adequate compensation of counsel be assured by the district court.

2. Mr. Harkins has commented that excluding punitive damages from Price-Anderson coverage, as proposed in S. 1761, would result in a loss of "most if not all" of the litigation efficiencies of the present system. Mr. Harkins stated that defendants would not be expected to co-operate with each other because of fear that any adverse admissions would be used against them in the non-Price-Anderson litigation over punitive damages. Another witness also testified that excluding punitive damages will destroy the channeling concepts of Price-Anderson.

Under the present system, claims for on-site damages are not covered by Price-Anderson.

Is there any evidence that the exclusion of on-site damages and the possibility that admissions made during litigation of off-site damages could be used in actions for on-site damages resulted in a loss of efficiency in resolving claims that are covered by Price-Anderson? Do you believe that an exclusion for punitive damages would cause a different impact upon the Price-Anderson system than the exclusion for on-site damages?

Exclusion of on-site damages is both a good and a bad idea for substantive reasons. First of all, priority should be given to accident victims above all other types of claims. However, as the Three Mile Island accident demonstrated, a high priority also has to be given to decontamination and clean-up. These expenses should come out of the fund after payment of accident victims.

As for conflicts among defendants, the comment of Mr. Harkins has to be addressed, and can be, without eliminating punitive damages altogether. Price-Anderson Act litigation involves litigation without regard to fault and only with respect to causation and damages. Regardless of who ultimately is at fault, all defendants have the same interest with respect to these issues, even though their interests might sharply diverge with respect to punitive damages.

(Response of David Berger to
Senator Stafford's Question 2. cont'd.)

To avoid any conflict either real or potential (which might be serious), a separate proceeding for punitive damages should be permissible,within the discretion of the Court or by legislation.

3. The testimony before the Committee has raised a concern over the inability to consolidate claims in a single federal district court in the absence of an extraordinary nuclear occurrence (ENO). I understand there may be constitutional problems in simply conferring federal court jurisdiction on state tort law claims. One possible way to avoid the constitutional issue might be to provide for a substantive rule of decision for the federal court to apply.

If we abolish the extraordinary nuclear occurrence test for determining federal court jurisdiction, then should we abolish the ENO test for the underlying substantive law as well and provide for strict liability for all nuclear incidents? If the ENO is abolished to overcome various procedural barriers to full and efficient compensation, then shouldn't similar substantive barriers be abolished as well?

There is no merit to the contention that constitutional prohibitions exist to the compensation of nuclear accident claims under federal law. Congress has the power to regulate what otherwise would be tort claims arising out of a particular activity, if it has the power to regulate the activity in general. Since Congress has the power under the commerce power to regulate atomic energy, it has the power to regulate damage claims arising out of nuclear power operations.

In any event, the current ENO requirement does nothing to improve the constitutionality of Price-Anderson. Moreover, it impairs the effective operation of the Act and permits the possibility that substantial claims arising out of nuclear accidents may be left to be litigated in a haphazard and piecemeal way. For these reasons, the ENO requirement should be abrogated.

I agree that the ENO requirement should be abolished for all purposes.

Price-Anderson Overhaul Vital

By DAVID BERGER

While it may take years to learn precisely what happened in the Chernobyl nuclear power plant disaster, it quickly and painfully became clear that a large number of persons who lived and worked near the facility suffered substantial physical and economic harm.

How — and to what extent — these victims will be compensated under the Soviet system remains to be seen. But under the rule of law that governs the United States, victims of nuclear accidents and other types of industrial disasters are unequivocally entitled to recover damages.

A federal law known as the Price-Anderson Act governs liability in the event of a nuclear power plant accident. Renewed twice since its original passage in 1957, Price-Anderson is set to expire in 1987 and is being revised by the Senate Subcommittee on Nuclear Power.

Based on my experience as the lead counsel for the plaintiffs in the litigation and settlement of the class-action for damages resulting from the Three Mile Island nuclear accident, I believe Congress must act boldly to eliminate the type of legal morass that results from industrial mass disasters.

The revision and renewal of Price-Anderson must acknowledge the painful lessons we have learned from the adjudication of such mass tort litigation as asbestos contamination, Agent Orange and Bhopal. The system devised before the era of mass industrial disasters must be revised to dispense justice in an expeditious and fair manner.

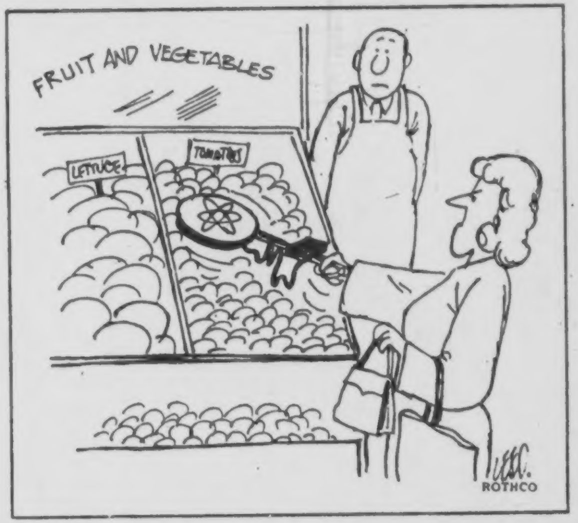
Victims of mass disasters should not be forced to wait years for compensation. The costs of the procedure for determining who is entitled to compensation must be sharply reduced, leaving the bulk of the money available for victims.

Accordingly, renewal and revision of the Price-Anderson Act should embody the following elements:

- Federal courts would be given exclusive jurisdiction to resolve all disputes arising out of release of radioactivity from nuclear power plant accidents.
- The federal court should be empowered to certify a mandatory, all-inclusive class so that all claims — both economic and personal injury — would be heard and determined in a single court.
- Once the court certified a mandatory class pursuant to the Federal Rules of Civil Procedure, the judge should order the lead counsel for the plaintiffs to submit a settlement plan. This settlement plan would provide for full compensation for all victims without proof of fault or negligence, providing the claimant could demonstrate harm suffered as a result of the accident and the extent of such harm.
- The federal court should be empowered in a single procedure to award punitive damages, but if any such damages are awarded, they would be paid to the U.S. Treasury.
- The settlement plan would establish a claims-handling facility that would evaluate and accept or reject claims in accordance with the plan. Claimants would have a limited right of appeal.
- The present liability limit of $640 million an accident must be greatly increased, but kept within bounds so as not to put the nuclear power industry out of business.
- Attorneys' fees should be based on a sliding percentage scale so as not to discourage prompt and expeditious prosecution of claims nor encourage, on the other hand, a windfall for attorneys.

Nearly every expert agrees the United States will suffer another nuclear power plant accident — probably worse than Three Mile Island — by the year 2000. Through proper revision of the Price-Anderson Act, Congress has a chance to bring the resolution of the resultant mass torts into the 20th century, before the 21st century arrives.

David Berger is the managing partner of the Philadelphia law firm of Berger & Montague and a nationally recognized expert in the field of class-action litigation.



REAUTHORIZATION OF THE PRICE-ANDERSON ACT

Statement of
William F. Kennedy
Counsel, Hunton & Williams
Washington, D.C.

Hearings before the
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate

Washington, D.C.
May 13, 1986

Mr. Chairman, my name is William F. Kennedy. I appreciate the Subcommittee's invitation to speak this morning to several critical issues relating to the reauthorization of the Price-Anderson Act.

For the last three years I have been Counsel to the firm of Hunton & Williams, in their Washington, D.C. office. My involvement with Price-Anderson and the issues before this Subcommittee goes back over thirty years. I have set out some of this in an Appendix as well as disclosure as to affiliations, activities and representations. I should emphasize that the views in this statement are my own and that I do not speak for any client.

Senator Simpson's letter of invitation asks for comments on three bills before the Subcommittee:

1. S. 445 introduced in February 1985 by Senator Hart would eliminate the ceiling on aggregate liability for all participants in nuclear programs.

2. S. 1225 introduced in May 1985 on behalf of Senators Simpson and McClure would not alter the fundamentals of the Act's liability structure.

3. S. 1761 and Amendment No. 770 (proposed for S. 1761) introduced in October 1985 by Senator Stafford would

- exclude punitive damages claims from the scope of the Act's liability protection; and
- permit cross-claims by contributing utilities against the utility immediately involved in the accident and cross-claims by the involved and contributing utilities against any other party, all based on state tort law.

In my judgment, the Simpson-McClure bill, S. 1225, apart from other desirable features, takes a sound approach on the liability issues. The elimination of the ceiling proposed in S. 445 or the treatment of punitive damages proposed in S. 1761 would make the Act unworkable and would devastate both Government and private nuclear programs. The provision for cross-claims in S. 1761 is limited to private programs but it also would make the Act unworkable with respect to those programs.

Punitive Damages

Let me turn first to the proposal on punitive damages. Increasingly that dimension of our present tort system is being recognized as scandalous.

1. There is a growing body of opinion to the effect that present state law regimes of punitive damages raise

substantial constitutional issues. M.E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Virginia L. Rev. 269 (1983); J.C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Virginia L. Rev. 141 (1986).

In Aetna Life Insurance v. Lavoie, 54 U.S. Law Week 4381 decided by the Supreme Court only last month, the Court noted that the retrospective imposition of punitive damages in that case had been challenged on Contracts Clause grounds and on grounds that it violated both the Eighth Amendment prohibition against excessive fines and the Due Process Clause of the Fourteenth Amendment. In dictum, Chief Justice Burger commented that "...These arguments raise important issues which, in their proper setting, must be resolved..." 54 U.S. Law Week 4381 at 4386.

2. The need for reform in the present system of punitive damages is recognized in bills on product liability under active consideration in this body's Committee on Commerce. It would be most incongruous if, while that consideration was in progress in another Senate Committee, this Committee incorporated the present disreputable system in the Price-Anderson Act.

3. The whole thrust of the Price-Anderson Act is to assure expeditious payment of claims by eliminating litigable issues and encouraging quick settlements or rapid judicial decisions - and in the process keeping down lawyers' fees! Introducing punitive damage claims into this process will encourage prolonged litigation, including trials and appeals, create obstacles to settlement of compensatory claims, and run up legal costs.

4. The capriciousness and unpredictability of present law and practice on punitive damages is one reason why the whole private sector - business, the professions, not-for-profits - as well as municipalities and federal procurement authorities are in arms about the tort litigation system and its abuses. No rational decision-maker would expose his organization, public or private, to the risk of liability for punitive damages, particularly if that risk would arise in the context of the distress and emotions generated by a nuclear incident.

5. It is worth noting that S. 1761 is totally devoid of either substantive or procedural standards for the award of punitive damages. For example,

- would an organization be penalized for misconduct of a low level employee acting contrary to policy?

- would each injured person be entitled to a punitive award and would there be multiple awards for the same offense?

- what would be the standard of conduct providing a basis for the award?

- what would be the standard of proof - preponderance of the evidence or, as proposed in the Commerce Committee bills, clear and convincing evidence?

- what would be the respective roles of judge and jury?

- would the punitive claim be tried with the compensatory claim or separately?

It is not satisfactory to respond to these queries by saying that they would be resolved under state law. The present body of state law on this issue is badly in need of reform at the federal level and, as I have noted, reform proposals are pending in this Congress which deal with some of the issues posed.

6. In other connections I have urged that the whole

punitive damages regime of U.S. tort law be scrapped. I have gone on to suggest that, to the extent that the Congress considers that objectives of retribution/deterrence require some non-criminal sanction, then consideration should be given to a regime of statutory civil penalties with carefully defined procedures and substantive standards.

I believe that idea should be considered in the context of tort reform generally and not at this time in the Price-Anderson context. If a rational system of civil penalties is developed, the Congress can then consider its appropriateness for the Atomic Energy Act and other federal regulatory statutes.

7. Absent a system of statutory civil penalties, there are three possible approaches to the treatment of punitive damages in the Price-Anderson Act. The first approach, the most desirable, is simply to preclude such claims in the case of a nuclear incident. A second approach is to permit them and leave them within the scope of the current Price-Anderson protection against "any legal liability". The third approach is that of S. 1761 and, for the reasons I have stated, this is the worst of the three.

8. The net of all this is that I hope that the Congress will adopt a course precisely the opposite of that advanced in S. 1761 and will expressly preclude punitive damages claims in the situations to which the Act applies. This would assure that compensatory claims would be treated expeditiously and equitably and with lower transaction costs (lawyers' bills!).

Ceiling on Liability

In considering the proposal in S. 445 to eliminate the ceiling on liability it is important to realize that it would totally repeal subsection (e) of § 170. This means that the ceiling would be eliminated for

- Governmental programs as well as private efforts;
- accidents outside the United States arising out of Governmental programs; and
- public bodies as well as private organizations.

It may be that many proponents of repeal of the ceiling would view with equanimity shutting down the U.S. nuclear electric power program. On that point my only observation is that if the Congress desires such a shutdown it should debate the issue directly and act directly.

I don't see how one can view with equanimity forcing private contractors to withdraw from defense-related nuclear activities. Neither do I see the rationality of subjecting U.S. contractors to unlimited liability and, in the first instance, unlimited lawsuits in this country and abroad, if there is an accident abroad involving nuclear weapons stationed there in defense of both our allies and our own country.

The Simpson-McClure bill would assure local government bodies that they will be within the scope of the Price-Anderson Act if they assist in the disposal of waste. But what is the value of that assurance if the Price-Anderson application means that their liability will be unlimited.

In proposing to repeal subsection (e) of § 170, S. 445 offers no clue as to whether the intent is that it would be prospective only or whether the intent is that it would be retroactive. Absent some explicit provision for retroactivity and considering the constitutional implications, I assume that the effect would be prospective only. This would still leave many thorny issues as to whether a given post-enactment activity was within the scope of pre-enactment protective arrangements.

The most obvious point about open-end nuclear liability is that it is uninsurable. If there was any question about this when S. 445 was introduced over a year ago, it should be clear now. Insurers can speak for themselves on this subject and don't need me or any other lawyer to make the point. But the situation in insurance markets is on the public record.

Let's take the effect simply of Government cleanup litigation under Superfund and of private hazardous waste and toxic substance personal injury and property damage cases. On some estimates, such as those of the Office of Technology Assessment, the cleanup costs alone will exceed the aggregate net worth of the liability insurance industry. If lower court decisions on the scope of Superfund liabilty are sustained on appeal and if the pollution coverage exclusion cases are decided adversely to the insurers, the minimum effect is that there will be severe constraints on capacity to cover other risks.

Even apart from Superfund and related claims, the property/casualty industry is undergoing profound stress because of the proliferation of large and unpredictable verdicts in personal injury litigation. This is amply documented in two recent studies sponsored respectively by Attorney General Meese and Governor Cuomo of New York. Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, February 1986; Insuring Our Future, Report of the Governor's Advisory Commission on Liability Insurance, April 7, 1986. The New York study suggests that current industry reserves for claims may be seriously inadequate.

If one looks at it from the perspective of managers of private or public organizations, the pressure will be overwhelming to withdraw totally from any activity, including defense work, which presents a risk of liability for a nuclear incident. This was perhaps always true but the pressure is compounded now by a tort litigation system which is out of hand and which foreign insurers, in backing away from the U.S. liability market, have likened to that of a banana republic.

Repeal of § 170(e) is a way - not a straightforward way - to terminate the U.S. nuclear electric power program, if that is what Congress wishes to do. The effects on national security programs are another matter entirely.

Cross-Claims

The third proposal I want to address is contained in Amendment No. 770 proposed for S. 1761. It would permit cross-claims by utilities which were not involved in a nuclear accident but which had paid an assessment under the coverage provisions. The cross-claims could be asserted against either the involved utility or others. The proposal would also permit the involved utility to assert cross-claims. The cross-claims would be governed by state law.

It is a commonplace that under the present tort system, the presence of multiple defendants asserting claims for contribution or indemnity against each other, delays and complicates the resolution, whether through settlement or trial, of the injured person's compensatory claim. One could expect the same result here, defeating the intent of the framers of Price-Anderson to provide protection to the public which would not only be assured but expeditious.

But the objections to the cross-claim proposal are more fundamental.

A keystone of Price-Anderson is the omnibus coverage which provides protection in one policy for anyone who may be liable. The single policy prevents so-called pyramiding of coverages assuring that the insurers would not have to respond under a multitude of policies for a single incident, thus in effect voiding their policy limits.

If a cross-claim provision were enacted, the insurance syndicates, in order to avoid pyramiding, would have to decline to cover anyone but the utility and then only up to the current limits. Persons other than the utility would have an uninsured liability exposure to the utility or its insurer up to $160 million.

The implications of the cross-claim proposal are much worse than that. On present indications, the aggregate assessment for non-involved utilities under the amended Act will be in the billions. The involved utility and others would then be exposed to uninsurable liability risks in the billions. The practical effect would be the same as repeal of the ceiling.

It goes without saying that any imposition of this exposure on a retroactive basis would raise the gravest constitutional issues. On a prospective basis it is simply another indirect way to terminate the nuclear electric power program.

Conclusion

The Price-Anderson Act, like all other works of man, is imperfect. But it is vastly superior to the current U.S. tort litigation system as a way of dealing with mass disasters. The asbestos cases, where the lawyers on both sides have been paid more than the victims, teach this lesson very forcefully.

The proposals in S. 445 and S. 1761 would introduce into Price-Anderson, state law concepts and procedures that are increasingly discredited among many sectors of society, including substantial segments of the legal profession. It would be especially incongruous to import these concepts and procedures into Price-Anderson at a time when they are undergoing intensive critical reexamination in many quarters, including state legislatures and other Committees of the Senate and House of Representatives.

There are ways to improve the Price-Anderson Act.

One way would be to put controls on attorney's fees to prevent the lawyers from taking too large a share of the financial resources which will be provided by utility ratepayers and perhaps by taxpayers.

If the Committee wishes to make changes going beyond S. 1225, that bill affords a mechanism for that and other improvements.

I should thank the Subcommittee and its Chairman and staff for this opportunity to testify on a subject with which I have been concerned for a good part of a professional lifetime.

APPENDIX

Since March 1983 I have been Counsel to the firm of Hunton & Williams, based in the Washington, D.C. office of the firm. The firm represents a number of electric utilities in environmental and other regulatory matters and in some litigation matters. The firm also represents the Long Island Lighting Company in connection with Nuclear Regulatory Commission licensing and other matters related to the Shoreham Nuclear Power Plant.

The firm has also represented the American Insurance Association in connection with the Superfund Reauthorization legislation and is engaged on behalf of private defendants in litigation under that statute. I have been personally engaged in Superfund litigation and legislative matters.

From 1953 until my retirement in March 1983, I served in various capacities as Counsel to General Electric Company. From 1955 to 1965 I served as Counsel to that Company's Nuclear Energy Division. During that ten-year period and later, I helped develop Company and nuclear industry positions on the original legislative proposals which became the Price-Anderson Act and on the proposals in the middle 60's to amend that Act by incorporating provisions for waivers of defenses.

During the 1970's, while Counsel to General Electric, I helped develop on behalf of the Aerospace Industries Association a proposal on compensation and liability for accidents in commercial aviation. This proposal was introduced in the 98th Congress as H.R. 4479 by Representative Glenn Anderson of California.

In 1982-83 I participated in the American Bar Association consideration of proposals to enact a federal statute on product liability. This included service on a Special Committee of the Association and debate in the House of Delegates.

Since 1982 I have served as Chairman of the Ad Hoc Committee on Tort Law Reform of the Section of Corporation, Banking and Business Law of the Association. In that capacity I have followed the evolution of the various proposals introduced in the Senate Committee on Commerce on product liability and in the House of Representatives and the Senate on compensation and liability with respect to harm arising out of exposure to toxic substances and hazardous wastes.

HUNTON & WILLIAMS
2000 PENNSYLVANIA AVENUE, N.W.
P.O. BOX 19230
WASHINGTON, D.C. 20006
TELEPHONE 202-955-1500

707 EAST MAIN STREET P.O. BOX 1535
RICHMOND, VIRGINIA 23212
TELEPHONE 804-788-8200
TWX 710-956-0061

FIRST VIRGINIA BANK TOWER
P.O. BOX 3889
NORFOLK, VIRGINIA 23514
TELEPHONE 804-625-5501
TELEX 755625

3050 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
TELEPHONE 703-352-2200

299 PARK AVENUE
NEW YORK, NEW YORK 10171
TELEPHONE 212-980-8200
TELEX 754708

ONE HANNOVER SQUARE
P.O. BOX 109
RALEIGH, NORTH CAROLINA 27602
TELEPHONE 919-899-3000

FIRST TENNESSEE BANK BUILDING
P.O. BOX 951
KNOXVILLE, TENNESSEE 37901
TELEPHONE 615-637-4311

FILE NO.
DIRECT DIAL NO. 202 955-1518

June 11, 1986

Honorable Alan K. Simpson
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment
and Public Works
United States Senate

Dear Senator Simpson:

This is to thank you for your kind letter of May 21. I very much appreciated the opportunity to testify before your Subcommittee in your May 13 hearings on the reauthorization of the Price-Anderson Act.

The two attachments to your May 21 letter set forth supplemental questions from you and Senator Stafford. I am enclosing for your hearing record responses to those questions.

Sincerely,

William F. Kennedy

William F. Kennedy

HUNTON & WILLIAMS

REAUTHORIZATION OF THE PRICE-ANDERSON ACT

Responses to Questions from
Senators Alan K. Simpson and Robert T. Stafford
(Senator Simpson's Letter of May 21, 1986)

Questions from Senator Simpson

Question 1. This question inquires about the feasibility of a two-step process under which claims by injured persons would be resolved in one action and the ultimate responsibility for payment of the claims as among several defendants would be resolved in a later separate action. In my judgment it is technically possible to do this but only by materially impairing the protection afforded to injured persons by the current system.

One premise of the current system is that private participants in nuclear programs should be subject to liability but only to the extent that that liability is insurable or indemnifiable. I assume it is not suggested that this premise be changed. Accordingly, I assume that under the proposed new regime, a potential defendant in a cross-claim or subrogation action would not be precluded from insuring against that liability and would be subject to liability only to the extent that it was insurable.

If this is so, what would be accomplished by the proposed new subrogation proceeding other than to subject nuclear program participants and their insurers to litigation expense without any compensating benefit to injured persons?

The objections against a cross-claim or subrogation provision go beyond a concern about wasteful and unproductive litigation. The whole structure would be meaningless unless different insurers insured different defendants. To put it another way, if all potential defendants insured with the syndicates now in place, the effect would be in important respects the same as the current omnibus coverage under a single policy obtained by the utility.

Testimony on behalf of the insurance industry submitted at the May 13 hearing makes clear one critical point. Breaking up the omnibus coverage mechanism and the current aggregation of insurance resources through the syndicates would at minimum drastically reduce the amount of coverage available to the utility or to any other single insured. This effect would be compounded by devotion of insurance industry resources to expenses incident to the subrogation litigation.

There are other economic advantages to the omnibus coverage mechanism reviewed in the May 13 testimony on behalf of the insurers. But the bottom line is that the cross-claim (subrogation) proposal would reduce the insurance resources available to protect injured persons without any compensating benefits except to the litigation bar.

Question 2. This question relates to the effect of insurance coverage litigation on the ability of claimants to recover in the normal tort context.

Published accounts over the last several years indicate that in the asbestos cases, disputes over coverage were a significant factor in delaying resolution of injured persons' claims. Representatives of the insurance industry may be able to provide more information on this subject. More broadly, it seems reasonable to suppose that in many cases payment of claims can be delayed by differences as to who is ultimately responsible for the payment.

In response to the second part of this question, it seems clear that the omnibus coverage mechanism under the Price-Anderson Act serves to avoid disputes as to which insurance policy applies.

Qustion 3. This question relates to the treatment of punitive damages in the Price-Anderson Act. My recommendation would be to provide expressly in the reauthorization legislation that punitive damages would not be recoverable in any proceeding subject to the Act.

Following the enactment of the reauthorization legislation, I believe the Congress should consider the enactment of a system of statutory civil penalties in lieu of punitive damages for outrageous conduct (properly defined) of senior corporate management (properly defined). The penalty would be paid to the United States rather than to a private person, although Congress might permit a private person to bring suit on behalf of the United States and might provide a carefully limited incentive for such a privately initiated suit.

I believe such a system, which would completely replace state law claims for punitive damages, should be considered not just in the context of the Atomic Energy Act but more broadly and at least in the context of Federal regulatory statutes generally.

It is essential that such a statutory civil penalty provision be totally disengaged from compensatory proceedings under Price-Anderson in order not to complicate and delay those proceedings. Such total disengagement is critical to the efficiency and fairness of the compensatory process.

Question 4. This question relates to possible increases of transaction costs if there is a move toward a regime of fault-based subrogation and to the effect of subrogation on the compensation process. I believe it has been answered in response to Question 1 above. In brief, transaction costs would materially increase and the effect of fault-based subrogation would be to reduce drastically the insurance resources available to pay victims.

Question 5. This question relates to whether there are constitutional concerns about changes in the Price-Anderson liability system which would apply retroactively. Such concerns would arise out of the fact that resources have been invested, commitments undertaken, and conduct engaged in, all on the basis of a network of protective arrangements against liability established by mandate of the Congress. These arrangements are embodied not only in the statute and agency regulations but in Government indemnity contracts and in private insurance contracts the terms of which were determined and approved by agencies of the United States.

Changes in these liability protection arrangements which applied to pre-enactment conduct or to post-enactment conduct required under pre-enactment commitments would under Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975) be subject to challenge under the due process clause if arbitrary or irrational. In sustaining retroactive imposition of obligations in the particular circumstances of Turner Elkhorn (the Black Lung litigation), Justice Marshall nevertheless observed "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 at 17.

Questions from Senator Stafford

Question 1. This question relates to treatment of attorney's fees in proceedings governed by the Price-Anderson Act. In brief, I would advocate the following:

1. An attorney for a successful claimant would be entitled to a separate award of fees in an amount to be

determined by the court.

2. The contingent fee would be abolished; no part of the recovery by the claimant would be paid to the attorney.

3. The jury would be informed of these arrangements and instructed not to take attorney's fees into account when determining the amount of the claimant's recovery.

4. Attorneys for plaintiffs and defendants would be subject to court-imposed monetary sanctions for assertion of frivolous claims or defenses or for dilatory, harassing or abusive tactics. There would be an exception for good faith arguments for changes in existing law.

The funds to compensate persons injured in an accident covered by Price-Anderson are to be provided by utility ratepayers, perhaps by utility shareowners, and perhaps by federal taxpayers. These funds should be applied to the maximum extent to compensation not to legal fees.

It is critical that we do not have in a Price-Anderson case a situation like that in asbestos where over 60 per cent of the amounts paid out by insurers on account of asbestos claims went to lawyers (plaintiff and defense) and to costs of investigation and preparation. A system like that suggested above should reduce legal and other transaction costs.

Question 2. This question relates to whether there should be an exception for wilful misconduct of corporate officers in Price-Anderson indemnities applicable to contract activities.

A proposal to incorporate such an exception was rejected by the Congress at the time of the original enactment of the Act. The ground for the rejection was that the exception would deny to injured persons the assurance that the indemnity would be available to provide funds for payment of claims. This logic still holds.

Where there is outrageous conduct (properly defined) of senior corporate managemnt (properly defined) I believe, as noted above, that such conduct should be the basis for imposition of civil penalties pursuant to substantive criteria and to procedures incorporated in the Atomic Energy Act. I do not believe such conduct should operate to void the protection against liability incorporated in indemnities under Price-Anderson for contract activities. Making the indemnity inoperative could deny effective protection to injured persons, would be unfair to shareowners, and could damage enterprises important to the national defense.

The question notes that indemnities provided for non-nuclear activities under other statutory authority are less favorable than the Price-Anderson provisions. On the basis of experience thus far it appears that nuclear risks are regarded generally by corporate management as of a magnitude and incalculability which make them sui generis.

This may be a mistaken perception and one can predict that a serious non-nuclear Bhopal-type disaster in a Government contract program would call for a major reassessment of current indemnity practices. There are strong arguments for the view that the restrictions in indemnities granted under other statutory authority do not serve either the interests of the general public or the interests of the Government.

The manner in which this question is formulated - with three references to a particular contractor - causes me to reemphasize the point made in my prepared statement, namely, that I am expressing my own opinion and that I do not speak for any client or for my firm or for any other individual or organization.

Question 3. This question poses the issue of whether all claims for injury arising out of a nuclear incident should be governed by federal substantive law and not just the claims arising out of an extraordinary nuclear occurrence (ENO).

The ENO distinction was incorporated in the Act to avoid federalizing claims which might involve individual rather than mass injuries and where the claims might be marginal or minor or without a substantial basis. The proliferation since then of "toxic tort" claims based on tenuous theories of causation demonstrates that this policy concern was not without foundation. Unless there are effective controls on groundless claims an undue proportion of insurance resources may have to be expended defending such claims, thereby reducing the coverage available for the serious accident.

In my judgment therefore exclusive federal jurisdiction should apply to the ENO and to any other mass case, defining the mass case as one where, as at TMI, there are a number of claims arising out of the same or closely related circumstances. In those situations I believe Congress should prescribe federal substantive law to govern the claims with the following elements among others:

- causation standards of "more probable than not" and "reasonable medical certainty";

- a procedure for determination of scientific/medical issues not subject to the current egregious abuses of "expert" testimony; and

- a definition of compensable harm to confine it to cases of actual provable physiological injury excluding cases of fear of injury and emotional distress and other psychological harms.

I should make a general observation about the responses to the foregoing questions. I believe matters of attorney's fees, statutory civil penalties, and federal jurisdiction require further extensive study, including Committee hearings focussed on those issues. Accordingly I believe they should be postponed until the Congress has acted on the basic question of reauthorization of the Act.

June 11, 1986

Respectfully submitted,

William F. Kennedy
William F. Kennedy

TESTIMONY OF KENNETH R. FEINBERG, ESQ.
SPECIAL SETTLEMENT MASTER IN THE
AGENT ORANGE PRODUCT LIABILITY LITIGATION
BEFORE THE SENATE SUBCOMMITTEE ON NUCLEAR REGULATION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

May 13, 1986

I am very pleased to be here today, Mr. Chairman, to testify concerning the reauthorization of the Price-Anderson Act. The issue is, of course, an important one, especially since, in many respects, the debate over Price-Anderson goes well beyond the limited confines of nuclear power regulation. Indeed, as to this latter subject I can do no more than offer a few additional comments to the detailed record being developed by this Subcommittee. My real expertise, and the apparent reason I have been invited to testify here today, concerns the broader issue of compensating claims arising out of mass disasters.

My testimony is based primarily on my ongoing experiences as the Special Settlement Master appointed by the federal court in the Agent Orange Product Liability Litigation. This mass tort case -- involving a class of some two and one-half million people, seven defendant chemical companies and the United States Government -- was settled on the eve of trial in May 1984. The lessons learned from both the settlement of that complex litigation and the proposed compensation scheme for claims arising out of the settlement, may, hopefully, provide some useful precedent when it comes to resolving other future mass tort disasters.

I was appointed by Chief Judge Jack B. Weinstein in April of 1984 to perform three distinct tasks:

1. To facilitate a settlement between the plaintiff class, the defendant chemical companies and the United States Government. This phase of my work was largely successful. The case between the Vietnam veteran class members and the chemical companies was settled for $180 million. Unfortunately, the United States Government refused to participate in the settlement. The case against it was subsequently dismissed.
2. To develop a plan for the distribution of the settlement fund. In February of 1985, I submitted to the Court a proposed compensation plan for the distribution of the $180 million settlement fund to eligible members of the plaintiff class. On May 28, 1985, the Court, after certain modifications of my submission, approved the Distribution Plan and authorized me to implement it.
3. To implement the Distribution Plan. In its Opinion, the Court reappointed me as Special Master with instructions to implement the court-approved Distribution Plan. I am currently engaged in securing the

necessary persons and institutions to implement the Plan so that the settlement fund can be distributed to eligible members of the class as soon as all legal appeals have been exhausted. This should occur some time later this year.

My role as Special Settlement Master in the Agent Orange litigation has taught me many salient lessons about how the law should go about compensating victims of a mass disaster.

One conclusion I have drawn, however, transcends all others -- the existing tort system simply does not work well when it comes to mass tort disasters. This is why I believe that the existing Price-Anderson compensation mechanism constitutes a valuable improvement over traditional tort notions of compensation and should be reauthorized with minor modifications. The Act is a model which should be replicated, in whole or in part, in other mass disaster contexts.

A second important lesson that I offer to the Subcommittee as a result of my experience is the necessity of distinguishing between "substantive tort reform" (a worthy goal in and of itself in dealing with the so-called "product liability crisis") and "compensation reform." It is this latter subject where Price-Anderson makes the most significant contribution, through the development of a statutory compensation mechanism designed to assist all parties -- the victim, the insurer, the facility operator and the public itself.

When it comes to mass tort disasters, our Nation confronts a series of situations where the tort system has broken down and where our traditional adversarial legal system is no longer equipped to offer a just, efficient, and effective resolution of disputes. Although the type of mass tort disaster may vary, the existing problems which confront the traditional tort system have been well documented:

1. Inconclusive evidence of causation. The task of establishing causation is a particularly acute problem when it comes to toxic substances. Many diseases caused by a toxic material are also caused by other environmental or nonenvironmental factors. It is often difficult or impossible to distinguish chemical-related disease from the normal background incidence of the same kind of disease, or to determine whether the exposure resulted in any adverse health impact at all.

This poses the fundamental question of whether the traditional tort system is equipped to decide cases involving claims of disease or injury allegedly caused by exposure to hazardous substances. Is the state-of-the-art sufficient to demonstrate a causal nexus between the exposure and the disease; what about intervening or multiple causes; which defendant should be deemed the primary offender; what about contributory negligence? These and other causation questions raise doubts about the ability of the traditional tort system to resolve damage claims arising out of exposure to hazardous substances.

2. Long latency periods; developing scientific knowledge of risk. In many cases, years or decades elapse between exposure to a toxic material and manifestation of disease. Frequently, as exemplified by asbestos, much more is known about risks when the medical problems start to arise than when the products or wastes were produced and the bulk of exposure took place. To compound this situation, contaminants can now be detected at increasingly small concentrations.

3. Multiple plaintiffs and multiple defendants. The health crisis may involve thousands or sometimes even millions of individuals, each of whom may claim harm from products produced by a number of different companies. One of the ironic features of the current tort problem is that the social utility of a particular product or process may actually increase the danger that pervasive use will result in millions of potential tort claims.

4. Public expectation of compensation for all risks. There is a growing public sense that companies should provide compensation to the public for as many risks as possible.

5. Enormous, unpredictable liabilities. With a large number of exposed individuals, rapidly developing scientific knowledge, and varied and changing legal rules of liability, companies can be subject to enormous unanticipated risks. Due to the enormous variation from state-to-state as to what constitutes an unsafe product or process, and at what point firms will be held liable, plus the uneven application of such standards from

case-to-case, the tort recovery method has become more of a crapshoot than an evenhanded compensation system. A relatively few injured people get very large awards, while most receive little or nothing. This inconsistency is not only inequitable to injured consumers, but detrimental to all society; uncertain and unclear application of the law diminishes the incentive of firms to act in a prudent manner when manufacturing or selling products.

6. Insurance problems. Increasingly it appears that companies may have inadequate insurance coverage, or may find that insurance companies seek to deny coverage on various technical grounds. The result may be massive lawsuits arising over such coverage. (One massive San Francisco litigation involves over 100 attorneys in a $5 billion lawsuit between five asbestos manufacturers and more than 65 asbestos insurers).

7. Very high transaction costs. Because of multiple parties, intractable scientific issues, and massive insurance disputes, expenses of litigation are enormous. The Rand Corporation has estimated that of every dollar spent on asbestos claims by manufacturers and insurers, injured workers receive only 37 cents. Thus, of the over $1 billion in compensation and litigation expenses that has been spent on asbestos claims, fully 630 million dollars have gone to attorneys and others who thrive from the present litigation.

8. Difficulty in obtaining compensation for some injuries. Where there is a relatively small increase in the incidence of

disease over a relatively large background level, individual claimants may be unable to meet the traditional burden of proof. Also, those with relatively minor injuries may be economically unable to obtain the legal representation needed for access to the courts.

9. High costs, delays, and erratic results. The inefficiencies of the tort system consume a large share of any award -- primarily for legal and expert witness fees and expenses -- and years may go by before claimants can obtain compensation. Due to unpredictable jury awards, some claimants may be handsomely rewarded, while equally meritorious claimants receive little or nothing. More specifically, many claimants who warrant compensation are left unprotected by current law. These include those injured by unavoidably unsafe products, those injured by unreasonably dangerous products in states which do not recognize strict liability, and those who cannot identify the particular manufacturer of the harm and who reside in states which do not recognize joint enterprise or market share notions of liability.

Ultimately Mr. Chairman, those claimants most at risk are those who will suffer future injuries. As I have already emphasized, existing tort litigation often diverts both financial resources and attention from business operations whose continuity is essential for the payment of these future claims. If the present situation continues, and if the assets of companies continue to erode, firms may not be in existence to pick up the tab for these future claimants.

10. Burdens on the court system. Large and complex tort litigation can clog the courts and increase the costs of court administration. The magnitude of the problem is illustrated by the massive trial in San Francisco to which I have already referred. A $210,000 renovation had to be done on a special auditorium merely to accommodate all the lawyers and other participants -- all of whom are being paid with dollars that could be better spent by compensating victims.

11. Burden on public sources of compensation. To the extent legitimate claims go unpaid due to the delays and inefficiencies of the tort system, or due to eventual depletion of corporate assets, injured claimants are forced to turn to public sources for care and support.

12. Disincentives for constructive action. In addition to being slow and expensive, and choosing the wrong people to compensate and reject, the present compensation system has the grave defect of inhibiting socially sound action by the threat of *post hoc* risk assessments having little relation to society's overall needs. Inhibition of production of useful vaccines is one recent newsworthy example.

* * *

As I view the problem, Mr. Chairman, the most important issues revolve around the questions: who should pay for some of the larger risks of living in a modern industrial-technical society; how much should be paid; to whom should payment be made;

and, perhaps most importantly, how should distribution of compensation be made?

Price-Anderson offers constructive responses to these questions. It focuses on efficient procedures for resolving nuclear disaster tort disputes. At the same time, the Act's compensation mechanism makes it easier for claimants to recover, provides certainty of result in the form of statutorily authorized liability coverage, and minimizes insurance coverage litigation while consolidating cases in a single forum. True, the Act limits aggregate liability to the amount of coverage provided under the law, but such a limitation appears reasonable if, at the same time, compensation to victims is assured with a minimum amount of delay and transactional costs.

Mr. Chairman, Price-Anderson provides an example of a time-honored legal trade-off: as you increase the likelihood of compensation and minimize legal obstacles to recovery, the law simultaneously limits the amount of compensation available to any individual claimant. This is the theory not only of Price-Anderson, but also of various state worker's compensation statutes. I am not an expert in the vagaries of Price-Anderson, and am not prepared to say whether or not the statutory ceiling on liability coverage is at an appropriate level. But I do favor the concept of limited recovery in return for the creation of a prompt, efficient, certain mechanism for resolving claims.

The insurance features of Price-Anderson seem particularly beneficial. In traditional tort cases where coverage is clear and liability straightforward, primary insurers cover most of the costs of tort judgments. However, as recent cases have indicated when it comes to mass torts, a defendant's liability is rarely if ever limited by its insurance coverage. Pressures on insurers and manufacturers have resulted in more and more cases where coverage is denied entirely, or producers carry inadequate coverage. Primary and secondary insurers fight among themselves as to which policy applies in a given case, and many insurers try to deny coverage altogether. Determining insurance contribution is particularly difficult in latent disease cases, because arguments can be made that insurers should not have to contribute in present-day dollars for claims resulting from exposures decades ago. Even now, the uncertainty as to correct present value of future compensation costs is leading to underestimation of long-term risks. Meanwhile, the worthy claimant suffers, unable to secure compensation.

I am concerned about proposed amendments to Price-Anderson that will likely increase the possibility of tort litigation. Providing for subrogation in certain cases should be avoided. In addition, Amendment No. 770 to S.1761 would permit certain nuclear utilities, other than the one at which an accident occurred, to seek reimbursement from the utility performing at the accident site. This proposed amendment moves away from the idea of "channeling" liability and could lead to the type of uncertainty and litigiousness which should be avoided.

Similarly, I question the merit of the proposal to increase the use of punitive damages as a remedy. In recent years punitive damages have generated tremendous litigation and promoted a vast increase in the nature and number of mass tort cases pending in our courts. If a punitive damage provision is to be added to Price-Anderson, I suggest that it be limited in scope and that a single consolidated punitive damage claim be required by statute.

Mr. Chairman, in limiting transactional costs, providing certainty of result and assuring a prompt resolution of disputes among facility operators, claimants and insurers, I believe that the Price-Anderson Act is an important precedent for helping us cope with the spectre of mass tort disasters. It is not a perfect piece of legislation and others more expert than I can undoubtedly offer areas for modification and improvement. But as one who has been involved on a daily basis for the past two years in attempting to fashion a compensation mechanism for victims of a mass tort disaster, I can say with confidence that the Price-Anderson compensation scheme remains a valuable precedent for compensating victims of such disasters.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

RESPONSES BY KENNETH R. FEINBERG
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
TO QUESTIONS FROM SENATOR ROBERT T. STAFFORD

1. Q: One witness has testified that the Price-Anderson Act could be improved by "put[ting] controls on attorney's fees to prevent the lawyers from taking too large a share of the financial resources which will be provided by utility ratepayers and perhaps by taxpayers."

(a) Do you agree?

(b) Should any recommendation for controlling attorneys' fees apply to the fees of both defense lawyer and plaintiff's lawyers? Do you have any specific recommendations?

A: Essentially, I agree. If the Act is to be expanded to include detailed provisions with respect to settlement and compensation procedures, control of attorney fees is a necessary component of any such proposal. In particular, controls on attorney fees should be tailored to encourage good faith efforts to settle disputes. In this context, limitations on fees should be applied to defendants' attorneys as well as plaintiffs' lawyers. It should be noted, however, that -- given the indirect linkage between defense lawyers' fees and eventual settlements -- control of plaintiffs' lawyers fees will be the predominant issue.

2. Q: The testimony before the Committee has raised a concern over the inability to consolidate claims in a single federal district court in the absence of an extraordinary nuclear occurrence (ENO). I understand there may be constitutional problems in simply conferring federal court jurisdiction on state tort law claims. One possible way to avoid the constitutional issue might be to provide for a substantive rule of decision for the federal court to apply.

If we abolish the extraordinary nuclear occurrence test for determining federal court jurisdiction, then should we abolish the ENO test for the underlying substantive law as well and provide for strict liability for all nuclear incidents? If the ENO is abolished to overcome various procedural barriers to full and efficient compensation, then shouldn't similar substantive barriers be abolished as well?

A: If Congress were to provide a federal rule of decision as a vehicle for estlablishing federal court jurisdiction over all nuclear accident claims, it might well make sense to abolish the ENO test altogether. As general matter, imposition of strict liability is a concommitant to limitation of total liability, such as is provided under the Price-Anderson Act. This is true, for example, in virtually all workers' compensation systems. This is also the basis for settlement of other mass tort claims such as the agent orange and certain asbestos claims.

3. Q: Mr. Feinberg, you strongly criticize the existing tort system for providing inconsistent results in providing compensation to injured, legitimate claimants. Yet you favor the concept of limited aggregate liability for nuclear incidents. However, for accidents that cause legitimate claims above the limit, injured persons may not be fully compensated, or not compensated at all. Such a system would seem to contain the very same inequities in our tort system to which you object.

You state that you are not an expert in Price-Anderson and therefore are not prepared to say what an appropriate limit might be. In fact, there has not been a single witness before this Committee, including the Department of Energy, the Nuclear Regulatory Commission, and representatives of the nuclear industry, that has been able to show, with evidence, what numerical level for the limit on liability would provide fair compensation for the victims of an accident.

Can a system for compensating victims of mass torts provide fair compensation for the innocent victims of an accident if an arbitrary limit on compensation is chosen beforehand?

A: While I cannot respond directly to your inquiry with respect to determining what an appropriate limit might be, I would reiterate that the concept of limited total liability is not necessarily inimical to the goals of providing expeditious and fair compensation to victims. Indeed -- as a practical matter -- limited liability may better promote these goals than a "fault-based" system of unlimited liability. As I noted in my testimony before the subcommittee, any proposal for dealing with mass tort claims must be specifically attuned to the dynamics of settlement of such claims. The potential for unlimited liability carries with it the prospect of protracted litigation which almost invariably breeds delays, erratic results, and diversion of resources. The net result is that unlimited liability can yield inefficient and unfair compensation. Limited liability, to the extent that it can encourage settlement procedures that will be expeditious and consistent, actually promotes fair compensation. Moreover, given the long latency period associated with certain of the predictable effects of a nuclear disaster, unlimited liability may mean that even if currently identifiable victims can be adequately compensated, the "deep-pocket" company and insurer might not be available to offer downstream compensation.

In short, while there is no perfectly satisfactory solution, limitation of liability may well be a necessary component of any plan that would provide prompt and fair compensation for victims of nuclear accidents.

4. Q: There is a difference in a limit on liability and a limit on the legal right to obtain full compensation. What should we do with victims that have legitimate claims for damages above the limit on industry liability that you support?

(a) Do you believe that persons should have a legal right to collect the amount of damages above the industry's limit on liability from some source other than the industry, such as the federal government, or that any amount of recovery above the industry's limit on liability should depend upon subsequent Congressional action (as is provided by the present Price-Anderson system)?

(b) Do you believe that the legislature is the appropriate branch of government to determine, after an accident, issues ~~regar~~ding amount of compensation and the source of funds for that compensation? Under our Constitution isn't it the responsibility of the legislature to prescribe rules before an accident as to how such issues will be determined after an accident?

A: (a) Everyone must, I think, feel some reservations in deciding that a problem is better left for resolution after disaster has already struck. Realistically, however, it may unavoidable that such questions be postponed. If this country faces a nuclear disaster that exhausts the 2.4 billion fund that would be created by the current bill, the political implications of such a disaster will require a major reconsideration of our policies with respect to compensation in any event.

(b) While I believe that Congress should move as far as possible toward providing an adequate legislative program for dealing with the contingency of a nuclear disaster, as noted above, I accept that there may be limits on the comprehensiveness of any solution that might be prepared before hand. As a constitutional matter, I see no defect in postponing certain decisions until contingencies come to pass. The problem of preparing for the eventuality of a domestic nuclear disaster is substantively different from the problem of dealing with a specific disaster of known proportions. Each is a legislative problem, appropriate for congressional action.

RESPONSES BY KENNETH R. FEINBERG

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

TO QUESTIONS FROM SENATOR ALAN K. SIMPSON

1. Q: In your testimony, you commented on the problems associated with multi-defendant law suits where "mass tort" litigation is involved. Please comment on whether it is possible to divorce entirely the effects of multi-defendant litigation by first litigating public liability claims, and then having the various defendants sort out their differences in a wholly separate subrogation action?

A: As a practical matter, unanswered questions with respect to subrogation, contribution and indemnity among defendants can have a significant deleterious effect on the efficient resolution of multi-defendant public liability claims. Uncertainty about subrogation, contribution and indemnity will generally undermine a primary defendant's willingness to undertake a costly comprehensive settlement program of the type required for prompt and fair compensation of public claims. Unless a defendant has some reasonable estimate of its likely "bottom-line" in terms of net costs of providing compensation, it will avoid going forward into settlement.

2. Q: To what extent does insurance coverage litigation between insurers for multiple defendants play a major role in the ability of plaintiffs to recover in the normal tort context where multiple defendants are involved, and is this a problem under the Price-Anderson Act, as it is currently structured?

A: Here again, as a technical legal matter issues of insurance coverage are distinct from issues of tort liability to the public. As a practical matter, however, the two issues are inextricably linked. In any mass tort situation, the primary mechanisms for compensating public harms lie in settlement procedures rather than in full-scale adjudication. As noted above, even if the legal issues can be separated, the settlement dynamic is dependent on some degree of certainty as to the "bottom-line."

3. Q: In your testimony, you commented on the issue of punitive damages. Please expand on how you think punitive damages should be handled and, specifically, comment on what impact, if any, a separate cause of action for punitive damages, beyond Price-Anderson's financial protection, would have on the litigation and settlement of claims under Price-Anderson?

A: As a general matter, punitive damages serve purposes -- punishment and deterrence -- that lie outside the usual scope of the civil justice system. In an area such as mass tort compensation, in which compensation issues predominate over questions of causation or immediate responsibility, this observation applies with even greater force. By their very nature punitive damage claims require determination of complex and often intractable questions of culpability and intent. This being the case, litigation over such claims is almost inevitably protracted. It is virtually unavoidable that such litigation, because it directly influences a defendant's "bottom-line, will have a significant impact on the settlement dynamic for public compensation disputes. While civil or criminal penalties may well be appropriate to deter certain egregious conduct, it would be a grave mistake to entwine such penalties with the plan for providing expeditious and fair compensation to the public.

4. Q: In your testimony, you discuss a number of different areas where, in your judgment, the litigation of mass tort disasters in the context of the traditional tort system has broken down. To what extent, in your view, are those specific problems minimized or eliminated by the existing Price-Anderson Act, and what "minor modifications" do you think need to be made to improve the workability and equity of the Price-Anderson system?

A: The most important areas of breakdown in the litigation of mass tort disasters involve: (1) delays in compensating victims; (2) erratic and unpredictable levels of liability; (3) diversion of resources away from the principals into the legal system. The Price-Anderson Act, by expediting the process of assembling funds to enable compensation to go forward, promises to reduce delays. By preparing a readily available fund and by setting specific caps at the various levels of liability, the Act allows operators of nuclear facilities to predict the outer limits of their potential liability and to insure accordingly. By fixing contribution requirements at each level, the Act limits, to some extent, the tremendous "tie-up" of resources associated with litigation of contribution, indemnity and subrogation claims.

One particular area of potential improvement would be to establish guidelines or conditions for setting up compensation procedures and facilities in order to expedite the actual settlement of public claims in the event of a mass disaster. The Act, as currently structured, provides a positive climate for such compensation systems but does not directly require, nor even suggest, efficient modes of effectuating the handling of public compensation claims.

5. Q: To what extent, in your view, are transactions costs going to increase, as we move in the direction of "fault-based" compensation under Price-Anderson--and particularly with a system that allows unlimited subrogation--and do the advantages of broader subrogation pay off from the standpoint of compensating accident victims?

A: There is no doubt in my mind that a shift toward "fault-based" compensation would significantly slow the most important object of the system, getting prompt relief to injured victims. While it is possible to imagine various ideal systems for apportioning liability in terms of fault, the transaction costs associated with such efforts are staggering. It is essential to face the fundamental fact that, if there is a major nuclear disaster, the problem of providing compensation will simply be too large for efficient handling by the court system through traditional adjudication. Our experience with such substances as agent orange and asbestos amply demonstrates that arranging fair and efficient compensation for mass torts requires the establishment of alternate procedures, and -- in effect -- a partial desertion of cherished notions of "fault" as a basis for liability.

6. Q: Please comment on the constitutionality of proposals to impose liability retroactively--either through a right of subrogation, the imposition of punitive damages, or any of the other proposals to change the liability for those reactor licensees covered under the existing Price-Anderson law?

A: Assuming that any legislation will be drafted with due regard to proper procedures, I see no constitutional impediments to Congress' alteration of the rules governing liability principles in this area.

Statement of Kenneth C. Hall
Consultant - Insurance Programs
General Electric Company

Before the
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate

May 13, 1986

Mr. Chairman and Members of the Committee:

My name is Kenneth C. Hall. I am Consultant - Insurance Programs for General Electric Company. I appreciate this opportunity to appear before your Committee to discuss extension of the Price-Anderson Act.

I have been actively engaged in the property-casualty insurance business for the past thirty-nine years, the last thirty-one years with General Electric with twenty-one years as Manager - Insurance during which time I have been intimately involved with the Price-Anderson legislation from its initial development and passage in the mid-1950's through its modifications and extensions in the mid-1960's and mid-1970's and the current discussion regarding possible extension beyond 1987.

Based upon my thirty-nine years of experience with insurance and related legislation for both nuclear and non-nuclear risks, I would most strongly urge that the Price-Anderson program of liability protection be extended as it has been twice before. While the nuclear activities in the United States have had an extraordinarily fine safety record to date, the remote possibility of a serious accident resulting in extensive injury or damage to the public unfortunately cannot be eliminated entirely. The whole history of Price-Anderson is based upon the commonly accepted fact that even with the best of safety programs and preventative design work there does remain a very remote possibility (probably so remote as to defy normal methods of calculating its probability - but not so remote as to be non-existent) of a severe accident that could cause serious damages off-site although the probable extent of such damages also defies normal methods of calculating probable dollar figures.

The Price-Anderson program was designed specifically to provide assurances of significant sums of money to be available on a guaranteed basis over an extended period of years to make prompt payment to victims of just such a remote and fortunately non-predictable type of accident. The only real change, other than the effect of passage of time through inflationary periods, since the original passage of Price-Anderson has been the violent and revolutionary changes in our legal tort system most of which have occurred over the last ten year period. These changes have greatly increased the unpredictability of the probable dollar damages resulting from any major accident whether it be nuclear or non-nuclear in nature, and make a system such as Price-Anderson only more essential for the period beyond 1987. If one studies any form of insurance or related types of financial protection, whether it be in the area of life insurance, property insurance or casualty insurance it becomes abundantly clear that the one critical element required to maintain a commercial insurance market is predictability of loss. Regardless of the degree of severity of loss, if the ultimate loss potential is reasonably predictable, then insurance type programs can be maintained and other variables basically affect the cost rather than the availability of insurance.

It is interesting to note the effect the recent changes in our tort system have had upon liability insurance in general, both in the nuclear and non-nuclear areas. Today, commercial insurance has become almost unobtainable in areas such as pharmaceuticals, chemicals, municipalities, space activities, directors' and officers' activities, physicians and hospitals, etc., etc. This disappearance of the commercial insurance market both here and abroad can be credited almost completely to the current trend of our tort system and the general level of discomfort on the part of professional underwriters in trying to predict the probable outcome of damage claims administered under the current U.S. tort system. If predictability is a key prime ingredient of any system to support a commercial insurance market, one can hardly think of a worse selection as hand maiden to casualty insurance than our tort system as it now stands and as it seems inevitably to be trending unless there is a firm legislative correction enacted in the near future.

It is critical to remember that the Price-Anderson program does very little to change the existing tort system except to guarantee the funds being available to satisfy the tort determinations and to make recovery even easier through the waivers of defenses incorporated in Price-Anderson in the mid-1960's. This is the same tort system that resulted in a recently reported judgment against the DuPont Company for $39.2 million in payment for a leg amputation allegedly necessitated due to the use of a commonly accepted medication - with over $13 million of this award to be paid to the plaintiff's attorney as his "contingent fee" for handling the case. It is my understanding that the case is to be appealed and may be reversed or modified as a result of such appeal, but it still stands as a prime example of where our current tort system is taking us.

While commercial liability insurance has virtually disappeared in many areas of exposure where unpredictability is far less obvious than it is in the nuclear area, it is interesting to note that to date there has been no indication of a significant reduction in private commercial insurance available in the nuclear area and the same underwriters are involved in both areas. This can, in my opinion, be explained only by the existence of Price-Anderson and its beneficial aspects in making a virtually unpredictable exposure at least manageable under its current provisions. It is extremely interesting to note the results of claims brought following the Three Mile Island incident and compare them with our recent history involving asbestos, agent-orange, toxic waste, and the Bhopal tragedy in India to name a few.

I can only agree wholeheartedly with Senator Simpson's comments in introducing S.1225 crediting the original drafters of Price-Anderson with anticipating and addressing many of the concerns which are now only being recognized in other areas. I would suggest that not only should Price-Anderson be extended but it should serve as a prime example for adoption and adaptation in other areas of serious liability exposures.

I would be the first to suggest, however, that there should be some changes in the current Price-Anderson rather than a simple extension of its current expiration date. Before considering such changes, however, I believe we should just stand back and take a quick look at the basic purposes of the Price-Anderson program and some of its key features that must be preserved in order for it to fulfill those intended purposes. Again, as mentioned by Senator Simpson in his introductory statement on May 24, 1985, the Price-Anderson Act was first enacted in 1957 for the two-fold purpose of:

(1) encouraging private industry to participate in the commercial development of nuclear power as an energy source and in nuclear

related activities of the U.S. government; and

(2) providing a comprehensive and predictable mechanism for compensating the public in the event of an accident involving nuclear materials.

To the best of my knowledge, the intent of Congress has not changed and I must assume that its intent is still to provide reasonable compensation to injured parties and to encourage, not discourage, industry to participate in both commercial nuclear power projects and in government contract activities in the nuclear field. If this is not so, and the intent of Congress is to actually discourage or deter industry from such participation, then other legislation should be adopted clearly stating such intent and not have that result come about from an over extension of the plaintiff benefit half of the very sensitive balance inherent in Price-Anderson. For many years, certain anti-nuclear forces both within and without the government have attacked Price-Anderson for its supposedly inadequate compensation provisions and its less than full guaranty of unlimited funds to satisfy whatever so-called "damages" the imaginative creativity of the plaintiff's bar may devise and our courts and juries may award. There is no question in my mind that certain of these critics would be delighted to see the liability system under Price-Anderson so automatic and the potential costs so great that no sponsors, whether in private industry or government, could or would be willing to afford them - and thus attain their true goal, the cessation of all nuclear activities in the United States.

The critical task before us is to maintain the sensitive balance between the two objectives of Price-Anderson in such a way as to provide reasonable and just treatment for innocent victims of any major incident while still allowing for full participation by the most qualified members of private industry and at a cost that can be justified and met when and if called upon.

There are several critical components in Price-Anderson that must be retained in order for the system to function properly and have its desired results. The most critical of these, in my opinion, are:

(1) Automatic implementation of coverage from the statute, and continuity of coverage for the life of any covered facility.

(2) Finite limit on total liability co-extensive with the amount of financial protection available and required to be furnished. Such amount must be reasonable, can be extensive but need not and probably should not be unlimited.

(3) Economic channeling of liability whereby the full use of private insurance can be obtained with, in effect, one source of recovery for

victims and potentially liable parties can rely upon the financial protection afforded to all parties and not be required to seek their own individual financial protection against possible legal liability.

(4) Waivers of defenses in the event of a significant nuclear incident to assure the prompt flow of benefits to the innocent victims without the normal time delay and expenses involved in pursuing recovery through our normal tort system. However, it is absolutely critical to preserve all normal defenses in less than significant nuclear incidents to prevent the Price-Anderson regime from becoming an automatic entitlement program for workers at nuclear sites or persons in the near vicinity who may allege a variety of "damages" based upon physical or psychological injury received from alleged exposure to nuclear material.

Other features of Price-Anderson are important, but primarily deal with the ultimate cost of the system rather than its viability in meeting the dual objective of the Congress. When considering the ultimate cost of the system, it is important to keep in mind that such ultimate cost will be borne by one of two groups - either the consumers of the taxpayers - who are the only two real sources of funds available to pay for this or any other system of liability protection.

At this point, I would like to address briefly the major changes in Price-Anderson suggested by the three bills currently pending before this Subcommittee - S.445, S.1761 and S.1225.

As I understand S.445, it would remove completely the existing limit of liability above the limits of required financial protection and/or governmental indemnification and would have the waiver of defenses apply to all "incidents" regardless of their severity or whether any alleged release exceeded authorized limits. This would subject all potentially legally liable parties to the full risk of our tort system without benefit of most defenses normally available to them. This would, of course, meet one of the Congressional objectives, that of providing compensation to the public; but would do very little to encourage private industry to participate in any nuclear program. If private industry was reluctant to accept the open tort liability risk under the tort system as it was commonly interpreted in 1957, there is no reason to believe that their concerns would be other than many times multiplied when evaluating similar risks under our tort system as it exists in 1986 or as it may be forecast to be over the next ten or twenty years.

The provisions of S.445 calling for the broad extension of the waivers of defense would, in my opinion, have a devastating effect upon the availability of private insurance. At the very least, it would increase the cost of insurance by a multiple of five or ten times current levels in my opinion and at the very least it would reduce the amount of available insurance by at least 50 percent through the loss of most foreign insurance now available to the nuclear insurance pools.

The provisions of S.445 calling for unlimited liability would have an equally devastating effect upon private insurance through a change in the allocation of available capacity. Each party in the chain of potentially liable parties would demand maximum insurance for his own account, and could not rely upon participating in insurance carried by the reactor licensee on his behalf. Nuclear liability insurance as we have known it since 1957 would, in my opinion, disappear and insurers would be unable to commit their maximum capacity to the licensee but rather forced to ration their available coverage among their myriad policyholders.

The net effect of the two provisions in S.445 would, in my opinion, result in the end of the nuclear insurance pools, a return of insurance to individual underwriters, and, if our recent experience in non-nuclear insurance areas is any indication, a virtual elimination of commercial insurance for nuclear risks in the future.

Rather than encouraging private industry to participate in nuclear activities, the two features of S.445 mentioned above would serve as an absolute deterrent to such participation. I cannot visualize a major corporation being willing to accept an unlimited liability under the current tort system and agreeing to waive all critical normal defenses under such system if this was an unacceptable proposition without the waiver of defenses in 1957 when the tort system was a virtual "pussy-cat" compared to the wild marauding tiger represented by the current tort system in the United States. Even if a major corporation were willing to accept the terms of S.445, it is my personal opinion, based upon thirty years of dealing with suppliers and sub-suppliers operating under current Price-Anderson, that it would be impossible to develop the necessary chain of suppliers and sub-suppliers to undertake any major nuclear project.

If the intent of S.445 is to apply these new rules to existing projects, I have great difficulty as a layman understanding how this can be done where thousands of contracts have been executed, work performed and suppliers delivered based upon complete reliance on the then current provisions of the Price-Anderson Act.

If I understand the provisions of S.1761, the net result is to maintain the economic channeling concept of Price-Anderson with omnibus financial protection furnished by the licensee, but remove the limitation of liability and leave unlimited liability for all parties funded by the nuclear utility industry, subject only to a maximum payment each year under the formula. I fail to see how any utility could afford to expose its share-owners or its customers to an unlimited liability under the current conditions of our tort system whether or not ultimate payments are extended over a period of years. I would suspect that many utilities, particularly publicly owned utilities, may face legal barriers to such an unlimited assumption. I assume, however, that the utility industry has already expressed their feelings regarding such an assumption of unlimited liability. There is also a serious question in my mind as to whether insurers could or would accept an unlimited liability even if the ultimate risk is theoretically covered by future premium payments by utility policyholders and guaranteed by the Nuclear Regulatory Commission. Here again, I assume that the insurers have expressed their concerns in this area.

Even if utilities and insurers were willing to accept these terms of S.1761, there would still remain a serious and probably insurmountable problem with suppliers and sub-suppliers who would still be subject to unlimited liability under tort law with nothing to prevent plaintiffs from pursuing immediate recovery under tort law regardless of the chronological spreading of financial risk under the terms of the secondary tier of insurance as envisioned in S.1761.

S.1761 also proposes an elimination of punitive damages from "public liability" which I assume would effectively remove punitive damage claims from the Price-Anderson system but presumably still leaves all parties subject to punitive damage claims under tort law. This provision alone destroys completely the channeling concepts of Price-Anderson and would have all of the adverse impacts discussed in connection with the unlimited liability provisions of S.445.

Proposed Amendment 770 to S.1761 maintains the channeling provisions of S.1761 (omitting any impact of S.1761 provisions re: punitive damages) and then calls for recourse against any party that may be legally liable under state tort law. The net effect of this provision is to effectively eliminate all channeling of liability. Every party from the utility licensee to the supplier of the smallest component part of a reactor plant would have to consider himself exposed to unlimited liability under tort law. Insurance capacity and allocation problems would be the same as discussed under S.445 and the net result of Price-Anderson would be to commit vast sums of industry money for payment of claims up front, eliminate most defenses normally available to defendants, and leave everyone exposed to full tort liability for "damages" already determined and paid on a no-fault basis and pre-funded by the utility industry.

S.1761 also clarifies the extension of Price-Anderson to waste activities and suggests a twenty-five year extension, both acceptable and laudable changes but not, in my opinion, sufficient to offset the critically undesirable major changes suggested by S.1761.

S.1225, as outlined in Senator Simpson's introduction on May 24, 1985, contemplates the following changes in Price-Anderson:

(1) Increase the limitation of liability for both licensee and contractor activities and

required financial protection for licensees from $735 million to $2.4 billion based on a population of 115 licensed commercial power reactors, and comparable indemnification for government contractors.

(2) Extend coverage of Price-Anderson to activities involving storage and disposal of nuclear waste.

(3) Stronger commitment by Congress to respond to claims in excess of the limitation of liability and financial protection.

(4) Extend Price-Anderson expiration date from 1987 to 2012.

I do not see where the provisions of S.1225, as introduced, would have any adverse impact upon the cost, availability or allocation of nuclear liability insurance; nor should they have any serious impact upon the willingness of suppliers to participate in nuclear programs. Channeling is retained. There remains a finite (although substantially greater) limitation of liability coextensive with assured financial protection, and waivers of defenses continue to apply only in significant nuclear incidents, and protection in the licensee area continues to flow automatically from the statute. Provisions to make 170d indemnity protection automatic or mandatory on the part of the Department of Energy would serve to strengthen S.1225 in the contractor area.

Acceptability of the $2.4 billion level of required financial protection (whether by an increase in the secondary tier of insurance or a combination of this and a new third tier) is a matter to be discussed with the utility industry, and while I do have extreme problems with any concept of unlimited liability under our present tort system, I believe the insurance and supplier industries would be willing to rely upon the economic channeling concepts of Price-Anderson up to an amount of $2 billion, although any significant increase above this amount could quite easily strain this reliance and create a significant drop-out of suppliers and/or insurers from the nuclear field.

I support the concepts inherent in S.1225 of a significant increase in the amount of financial protection, extension of coverage for waste activities, and a longer extension period than we have seen in the past and congratulate its sponsors for evaluating all of the arguments pro and con that have been expressed in recent years, and introducing a well-balanced bill that in essence is fair and reasonable from all viewpoints.

In response to the specific questions incorporated in the invitation to testify before this subcommittee, I would respond briefly as follows although most of the answers have been included or inferred in prior portions of this statement:

(1) The economic channeling feature of Price-Anderson, coupled with the limitation of liability coextensive with the combined programs of financial protection, without any question in my mind provides the only means of maximizing the amount of

liability insurance which the commercial insurance market is willing to commit for any single nuclear incident or any number of such incidents. Without this channeling and resulting "omnibus" insurance policy for each reactor site, insurers would be faced with a demand for similar insurance from myriad policyholders. The obvious result would be much higher aggregate insurance costs and a small fraction of the current $160 million capacity available to any one insured since underwriters would have to consider the possibility of several policies being called upon to respond to a single nuclear incident under existing theories of joint and several liability of tort-teasers. If only one party were held legally liable, only a small fraction of the current capacity would actually apply to that incident. Settlement and payment of public liability claims would be horribly complicated and greatly delayed since no individual policy would respond until the legal liability of that particular policyholder was clearly established. There would be no special nuclear insurance pools and legal skirmishes among potentially liable defendants and their insurers would greatly increase the cost of defending claims and would delay all claims settlements for a minimum of several years in most foreseeable circumstances.

(2) Modification or elimination of the channeling feature would have a very serious detrimental impact on the efficient payment of public liability claims, even if coverage some way could be continued to be provided by special nuclear insurance pools. In fact, however, coverage would probably revert to

individual insurance carriers with no guarantee of continuous coverage and in much smaller amounts. If our recent experience in the non-nuclear insurance field is any indication of what might be expected in the nuclear field (and there is no reason to suspect that it is not) I would expect insurance costs to increase by 200 to 500 percent or more, and my personal opinion is that nuclear liability insurance would be unavailable at any cost.

Without the channeling feature of Price-Anderson, coupled with the statutory limit of liability, I fail to see how any corporation could in good conscience participate in the design, construction, sale or servicing of nuclear facilities, components or fuel. I personally could never recommend any major involvement in the nuclear supply industry if the channeling and limitation of liability provisions were removed from Price-Anderson even though I plan to be retired from my present employment well before the current expiration date of the Price-Anderson Act.

As I interpret it, the proposed Amendment 770 to S.1761 does, in fact, eliminate the practical effects of economic channeling under Price-Anderson and would have the same impact upon insurance capacity, insurance cost, allocation of insurance, claims settlement, and participation of industry in the nuclear supply business as a complete elimination of the channeling provisions.

(3) The amount of insurance committed to the nuclear industry by the insurance industry contemplates both indemnity

payments and assumption of defense, investigation and settlement costs. In my opinion, insurers would not, and probably should not, agree to be responsible for claims payment if they were not free to control the investigation, settlement and litigation of such claims. Since these costs must be considered as inseparable components of the cost of handling public liability claims, separating one from the other would simply require two separate commitments from the insurers and in most conceivable cases the total usage of the two components would result in something less than the current combined commitment and a reduction in total protection provided under the system.

(4) Any prohibition on the payment of punitive damages out of financial protection as suggested in S.1761 would be the same as elimination of the channeling provisions in Price-Anderson and would, in my opinion, have exactly the same results as suggested in answer (2) above.

(5) To summarize my personal opinion as to the impact of the three legislative proposals currently before the Subcommittee:

S.445

The combined effect of the key features S.445 would, in my opinion, cause the total collapse of the special nuclear insurance as we have known it since 1957 and insurance through normal channels would be available in very nominal amounts, if at all. Some new method of providing financial protection would be required and some method of consolidated claims handling designed to replace the function normally carried out by insurers and one which I believe was very well executed following the Three Mile Island incident.

I personally would be unwilling to recommend participation in the nuclear supply business under the liability terms suggested in S.445.

S.1761

Even if the funding provisions for unlimited liability incorporated in S.1761 were found acceptable to and legally possible for the utility industry, other provisions in S.1761 and Amendment 770 calling for the elimination of coverage for punitive damages and ultimate recourse against any party based on normal tort law standards effectively emasculate the key provisions of Price-Anderson in its present form and would have the same impact as S.445 upon insurance cost, insurance capacity, claims handling and my willingness to recommend any major participation in the nuclear supply business.

S.1225

The provisions of S.1225, as introduced, should in my opinion have no significant impact upon the cost, availability or allocation of nuclear liability insurance provided the payment of the increased retrospective premiums continues to be guaranteed by the U.S. government.

If the utility industry is willing to and legally can accept the increased burden of retrospective premium charges to bring the maximum financial protection up to the suggested $2.4 billion level based on a population of 115 licensed power reactors, I would be willing to recommend participation in the nuclear supply business insofar as the liability exposure problem is concerned.

S.1225, in my opinion, represents a fair and responsible answer to the many diverse comments raised in connection with Price-Anderson extension and should be strongly supported by all interested parties who are seriously looking for a solution to the liability problem which is eminently fair to potential innocent victims of the nuclear incident which we all hope never occurs and one which still leaves the nuclear option open without driving out the most qualified and most desirable segments of private industry.

I commend the sponsors of S.1225, encourage its adoption without major substantive changes and wish again to extend my thanks for the opportunity of expressing my views to the Committee.

GENERAL ELECTRIC
CORPORATE TREASURY OPERATION
GENERAL ELECTRIC COMPANY • 570 LEXINGTON AVENUE • NEW YORK, NEW YORK 10022-6853 • (212) 836-3161

FEDERAL EXPRESS

June 16, 1986

The Honorable Alan K. Simpson
Chairman - Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Sir:

This is in reply to your letter of May 21, 1986 requesting answers to additional questions in connection with my testimony presented at the May 13 hearing of the Subcommittee on Nuclear Regulation on reauthorization of the Price-Anderson Act.

I am enclosing, herewith, answers to the various questions posed by you and Senator Stafford and would be happy to submit any further information or comments you may wish.

Very truly yours,

KC Hall

CONSULTANT - INSURANCE SERVICES

KC Hall:ojh
enc.6

REAUTHORIZATION OF THE PRICE-ANDERSON ACT

Responses to Questions from
Senator Alan K. Simpson and Senator Robert T. Stafford
(Senator Simpson's Letter of May 21, 1986)

Questions from Senator Simpson

Question 1. In your testimony, you commented on the problems associated with multi-defendant law suits where "mass tort" litigation is involved. Please comment on whether it is possible to divorce entirely the effects of multi-defendant litigation by first litigating public liability claims, and then having the various defendants sort out their differences in a wholly separate subrogation action?

Response:

The reason that problems normally associated with multi-defendant lawsuits in "mass-tort" litigation were minimized in the Three-Mile-Island case and would more clearly be minimized or eliminated in a major nuclear incident covered by Price-Anderson (as it has existed since 1957) is that one insurer and one law firm can respond on behalf of all defendants. Each potential defendant can readily accept this single representation since any resulting liability on his part under the applicable state law would be covered under the provisions of the insurance policies and/or indemnity agreements up to the statutory limit of liability.

With the waivers of defenses in case of a major nuclear incident, claims can be disposed of after proof of causation and establishment of monetary damages without even raising the issue of fault on the part of one or more of the defendants. In the case of a lesser incident, where the waivers of defenses are not triggered, claims can be disposed of in much the same manner. Even if fault must be established under the applicable state law, there is no need to apportion fault among various defendants since the cumulative fault of all possible defendants is again covered under the single insurance arrangement up to the statutory limit of liability. If valid claims exceed the statutory limit, presumably in a case in which the waivers of defenses have been triggered, these claims can also be handled under the current Price-Anderson regime without any determination of fault or apportioning of fault among the several potential defendants.

If one attempts to devise a system where claims are first settled or litigated without resolving the question of fault or allocation of fault among defendants and then a second round of litigation is used to recover losses paid from one or more defendants, the whole Price-Anderson system would, in my opinion, collapse. Neither one insurer nor one law firm could represent all of the potential defendants due to the multiple conflicts of interest inherent in such an arrangement, and each potential defendant would be entitled to, and presumably would demand to have, its own representation in negotiating or litigating with claimants prior to the settling of the third-party claims.

Furthermore, each potential defendant would insist upon his own insurance, in which case, the insurers could not make their maximum capacity available to all as they do now, but would have to ration that capacity among their myriad policyholders seeking coverage.

The net result of such a system would, in my opinion, result in a drastic reduction if not elimination of commercial insurance, and would reintroduce in the nuclear area all of the problems associated with multi-defendant lawsuits in nonnuclear "mass-tort" litigation.

The only way I can see to make the two-tier system referred to in the question work in the nuclear area is to develop a commercial insurance market which could afford coverage up to the statutory limit of liability for each participant in the nuclear industry. This is not feasible if one listens to the commercial insurance carriers whose message in this area has been clearly consistent over the past thirty years. Even if this were possible, I doubt that anyone would want to impose the horrendous cost increase such a system would incur. Nor do I believe there would be any rational way to determine the ultimate cost to all suppliers over the forty-plus years' life of a nuclear plant nor any way to factor this forty-year cost into the price of original equipment furnished to a nuclear power plant.

A two-year system as suggested might work if the original claims were settled under some form of a compensation schedule, in contrast to tort damages, and then litigated under tort rules among the various potential defendants only if one were to retain the economic channeling and omnibus provisions of Price-Anderson for this second-tier action. But I fail to see where the results would be any different from the current system except that claimants would be compensated according to a fixed schedule of benefits and such a system would undoubtedly place some restrictions upon the legal fees to be charged for representing the claimants.

Question 2. To what extent does insurance coverage litigation between insurers for multiple defendants play a major role in the ability of plaintiffs to recover in the normal tort context where multiple defendants are involved, and is this a problem under the Price-Anderson Act, as it is currently structured?

Response:

Where there are multiple claimants, multiple defendants, and multiple insurers all involved in one "mass-tort" case, there are bound to be multiple levels of demand by claimants, multiple and conflicting theories of defense by defendants, and multiple positions of coverage by various insurers under various insurance policies containing both similar and dissimilar wordings.

Almost every defendant is reluctant to settle large damage claims if there is a question remaining at such time as to the extent of coverage under the liability insurance policy or policies available to him.

For these reasons, I believe we can expect insurance-coverage litigation to play an important role in "mass-tort" litigation and can expect it to seriously hinder the settling of many plaintiffs' claims and to considerably delay even the ultimate litigation of such claims. I believe that recent and current experiences in such areas as asbestos and Superfund bear out such expectations.

Under the Price-Anderson Act, as currently structured, this problem is reduced to a bare minimum if not completely eliminated due to the economic channeling of liability, the omnibus provisions of the insurance coverage, and the fact that all defendants are covered under a single policy with wording carefully designed to afford coverage for all of the damages expected to flow from a covered nuclear incident. The single policy with identical wording for all nuclear-reactor sites further removes the probability of coverage litigation, since the single insurance policy wording must be approved not only by the policyholders but by the Nuclear Regulatory Commission in order to qualify as "financial protection" under Price-Anderson.

Question 3. In your testimony, you commented on the issue of punitive damages. Please expand on how you think punitive damages should be handled and, specifically, comment on what impact, if any, a separate cause of action for punitive damages, beyond Price-Anderson's financial protection, would have on the litigation and settlement of claims under Price-Anderson?

Response:

Permitting recovery of punitive damages outside of the Price-Anderson system or without benefit of Price-Anderson's financial protection would, in my opinion, be no different than returning to full unlimited liability under the tort system with none of the special advantages of Price-Anderson for simplifying and accelerating litigation and settlement of claims.

Potential defendants could not rely upon a utility company's insurance policy to provide coverage for compensatory damages if payment under such a policy could prejudice such defendants' later defense of punitive-damage claims arising out of the same incident. On the other hand, I cannot see how a single insurer or single law firm could handle the compensatory-damages claims for all defendants, if their policyholders or clients would then be subjected to punitive-damages claims arising out of the same incident. Not only would settlement or litigation of compensatory-damages claims be severely hampered and greatly delayed, but I would suggest that such a system would also spawn an unbelievable chain of additional litigation with allegations of bad faith on the part of the "omnibus" insurer and charges of professional malpractice against any law firm that attempted to handle such claims in the face of such an obvious conflict-of-interest situation.

The theory of punitive damages has, in my opinion, been so badly abused in recent years as a means to increase the pressures to settle compensatory-damages claims or to increase the "value" of such claims to allow for the payment of legal fees without significantly reducing the plaintiffs' recovery of compensatory damages that I seriously question its validity as part of any rational tort system whether in the nuclear or nonnuclear field.

In the case of "mass-tort" incidents involving multiple plaintiffs all claiming damages as the result of one accident of a single course of conduct, most people I meet and most legal scholars whose work I read seem to agree that the theory of punitive damages as incorporated in our current tort system does not make very much practical sense and should be seriously modified if not eliminated.

In order for the Price-Anderson system to operate, I believe that it is critical that punitive damages, to the extent that they are allowable, be covered within the "financial protection" provisions of the Price-Anderson regime.

I believe that there is a strong argument in favor of eliminating punitive damages in all mass-tort cases, including nuclear, and would support such elimination. The deterrent purposes of punitive damages could be replaced by appropriate civil penalties based upon willful misconduct of directors or officers of the offending entity. Such provisions for civil penalties should be clear and concise, based upon a clear standard of recklessness, and should be dealt with in other sections of the Atomic Energy Act as safety incentives and not as part of the Price-Anderson Act which basically deals with public protection and participation of industry in the nuclear field.

Question 4. To what extent, in your view, are transaction costs going to increase, as we move in the direction of "fault-based" compensation under Price-Anderson--and particularly with a system that allows unlimited subrogation--and do the advantages of broader subrogation pay off from the standpoint of compensating accident victims?

Response:

A change in the Price-Anderson to allow for subrogation based upon fault theories after compensating victims under the licensee's program of "financial protection" would destroy the concepts of economic channeling and omnibus coverage which are critical to the current system and, in my opinion, would undermine the entire Price-Anderson system. Any move in this direction would greatly increase transaction costs, delay the settlement of claims, and result in fewer dollars being available for actual victim compensation.

Any system that would allow for unlimited subrogation based upon fault would convert the nuclear system to a standard tort environment, and one could only expect the extreme delays and outrageous transaction costs that have been experienced in other "mass-tort" litigation in recent years.

As for improving the system from the viewpoint of compensating accident victims, it seems to me that a system such as the current Price-Anderson regime which greatly reduces all transaction costs (except for plaintiff attorney fees) serves to maximize the amount of available funds that can be used for victim compensation. Since any program based upon partial or complete subrogation would increase the overall transaction costs from the defendants' side and would have no effect upon such costs from the plaintiffs' side, it is hard for me to see how the net result could be anything other than a reduction in the amount of available funds that would eventually be used for true victim compensation.

Question 5. Please comment on the constitutionality of proposals to impose liability retroactively--either through a right of subrogation, the imposition of punitive damages, or any of the other proposals to change the liability for those reactor licensees covered under the existing Price-Anderson Law?

Response:

Being neither an attorney nor an expert on constitutional law, it is rather presumptuous for me to comment on the constitutionality of retroactive changes in the liability protection for reactor licensees or others from that which has been provided under Price-Anderson.

Since Price-Anderson does little to change the liability exposures of the various parties, but rather provides an "umbrella" type of protection against existing liability, the net effect of most proposed changes is to effectively remove some of this protection rather than change the actual liability of the parties. Other than the statutory limitation of liability and the waiver of defenses in the event of an extraordinary nuclear occurrence, my understanding of Price-Anderson has always been that the liability of the parties generally remains as found under applicable state law.

To the extent that various proposals weaken or remove the statutory limit of liability or the "umbrella" protection provided by Price-Anderson for reactors licensed under prior Price-Anderson standards, there would seem to me to be a serious question as to the constitutionality of such proposals. To date, the changes in Price-Anderson have carefully preserved these two basic concepts although the statutory limit of liability was increased when the second tier of private financial protection was introduced, with full concurrence of the utility industry, to phase out the bulk of governmental financial risk in the indemnity area contemplated in the original legislation.

Some of the currently proposed changes which would drastically alter or eliminate the financial protection available to non-licensees or would significantly increase the financial risk of the utility industry without their concurrence would seem to raise serious questions of constitutionality if they were applied to existing reactor sites. If applied prospectively, both utilities and their suppliers could make a conscious decision to proceed or not with development of nuclear power.

If, however, these changes were to be applied retroactively to existing plants, there would seem, in my mind, to be not only legal questions ofconstitutionality, but serious questions as to a breach of faith on the part of the government with reference to the thousands of contracts that were executed, supplies that were furnished, and reactor plants that were put into operation with complete reliance upon the original Price-Anderson legislation and the very clear Congressional record that assured one and all that once a construction permit was issued, the then current Price-Anderson regime would remain in force for the operating life of that licensed facility. Absent such assurances, no supplier could have furnished equipment or services for a plant with an expected operating life of forty years or more. The existence of a Price-Anderson-type regime was critical to that commitment.

Question 6. As a representative of one of the parties currently shielded from liability under the "umbrella coverage" of the Price-Anderson Act, why is it that you would advise your company against participating in the nuclear enterprise if you were exposed to offsite liability claims? And why is it that the threat of a first party lawsuit by a utility for a reactor that is destroyed in an accident--at a cost of $4 or $5 billion--would not create the same type of disincentive, even with Price-Anderson covering offsite liability?

Response:

From a supplier's point of view, the problem of third-party (off-site) liability claims are ones that must be faced in all business transactions, not only in the supplying of equipment or services to a licensed nuclear reactor. In analyzing these exposures, one must consider both frequency and severity to determine whether the total risk is one that is acceptable or not given a probable spread of risk based upon the number of units to be sold and the expected life of such units.

Liability insurers must evaluate the same range of problems to determine whether they can provide third-party liability insurance and, if so, in what amounts.

Off-site liability risks inherent in the commercial nuclear-power-reactor-field are of such a nature that normal insurance markets are not available; and, for many of the same reasons, suppliers of both major and minor components find it impossible or impractical to accept an unlimited and uninsured liability. This was true in the mid-1950s when industry indicated quite clearly that it could not accept normal tort-liability exposures in the nuclear-power field. Nothing has occurred to change this evaluation.

We know more of the probabilities of loss due to some thirty years of reactor operation in the United States without a major off-site incident, but the probability of loss cannot be reduced to zero even though the remoteness of probability makes it virtually impossible to calculate any assurable probability of loss. As many of us stated in the 1950s, when Price-Anderson was scheduled for a review and update in ten years, ten, twenty or thirty years of successful operation would not change this impossible probability of occurrence calculation.

The other side of the coin in risk evaluation is the severity of loss. Here again, it was impossible in the 1950s and is still impossible today to determine the realistic extent of potential damage in the worst accident case. The net result of the risk-calculation formula, then and now, is that there is a virtually incalculable remote chance of encountering a loss or immeasurable (in advance) magnitude.

The third factor which makes the nuclear off-site risk virtually immeasurable through normal insurance channels and an unacceptable risk to an equipment supplier is the limited base of exposure. With some 100 reactors licensed in 30 years, the exposure is spread over so small a base that the law of large numbers cannot come into play. Therefore, the loss of the few must be borne by the few--contrary to the normal insurance, or self-insurance, principle where the losses of the few are borne by many.

The final factor that makes the unrestricted off-site liability risk unacceptable to industry is the expected long-life cycle of the commercial nuclear-power-plant. With a limited number of plants operating over a forty-year-plus period, with an immeasurably remote chance of an immeasurably severe accident, there is no way to factor a risk assessment into the price of original equipment on any sane or rational basis.

The Price-Anderson regime, as originated in 1957 and as modified to date, has provided a unique method of preserving all the rights of accident victims and at the same time through its concept of "economic channeling" transferring the economic burden of insurance premiums and ultimate claims payment to the utility licensees. The cost burden can be spread over all of the nuclear-power plants that come into being and over the operating lives of these plants without overburdening the system with massive pre-funding (through insurance premiums or increased equipment costs) for the catastrophic losses which in all probability will never occur yet still assuring the availability of funds to pay the victims of such accidents if the improbable accident happens.

For all of the above reasons, I would personally not recommend any equipment supplier to engage in the commercial nuclear-power-field with open-end unlimited liability for off-site damages under the United States tort-law system as it exists today or as it may be developed over the life span of new reactor-power-plants. I not only feel strongly that Price-Anderson is the proper approach to catastrophic loss exposure in the nuclear field with vastly improved protection for the public and a rational system that can be accepted by industry, but I firmly believe that similar approaches should be utilized in other areas of commercial and government enterprise where truly catastrophic losses may be encountered, rather than waiting for the catastrophe to happen and letting the "chips fall where they may" under an unfettered and indefinite system of tort liability.

The threat of on-site liability with current plant values running into the billions and loss-of-use exposure in addition to the "brick and mortar" claims would be of equal concern to me if the only alternatives were coverage under Price-Anderson or unrestricted exposure to loss under the current tort system. In the early days of Price-Anderson history, we were looking at plant sites with values in the $60-million range; and the Price-Anderson Act, as originally passed, included "on-site" damage within the definition of "public liability" and, therefore, covered within the statutory limit of liability and the omnibus features of the financial protection. This feature of the Act was amended in about 1959 to clearly exclude the "on-site" damage from the definition of "public liability", therefore, exposing suppliers to on-site-damage liability claims. Since that time, the plant values have increased to the multibillion-dollar range referred to in the question. Contrary to the "off-site" liability exposure, there are other means available to industry to handle the "on-site" problem, principally because we are dealing with a single potential plaintiff rather than the multiplicity of plaintiffs involved in "off-site" liability claims.

Firstly, virtually every commercial nuclear-power-plant is insured for damage to the plant itself in substantial amounts through the special nuclear property insurance pools and utility-sponsored insurance companies. Standard terms in these insurance policies provide for an automatic waiver of subrogation rights by the insurers in the event of a nuclear-damage loss.

In addition to the waivers of subrogation built into the property insurance policies, a supplier has the right and opportunity to insist upon a waiver of liability from a nuclear-power-plant owner/operator as a condition to agreeing to furnish a particular piece of equipment or service for such plant. To the best of my knowledge, most if not all of the currently licensed power reactors in the United States were constructed under contracts incorporating such waivers of liability. Through this mechanism, the ultimate financial burden of the "on-site", as well as the "off-site", nuclear risks is borne by the utility industry where it can be spread over the industry and over the life of the licensed facilities without the fiscally unsound practice of pre-funding for each loss which in all probability will not occur.

While contractual arrangements as outlined above may be more difficult and cumbersome to effectuate than a simple statutory provision accomplishing the same result, they can be and have been effectuated and as part of overall contractual agreements may, if nothing else, be less vulnerable to retroactive change once the contracts have been consummated.

Questions from Senator Stafford

Question 1: One witness has testified that the Price-Anderson Act could be improved by "put[ting] controls on attorney's fees to prevent the lawyers from taking too large a share of the financial resources which will be provided by utility ratepayers and perhaps by taxpayers."

(a) Do you agree?

(b) Should any recommendation for controlling attorney's fees apply to the fees of both defense lawyers and plaintiff's lawyers? Do you have any specific recommendations?

Response:

(a) There is no question but that the Price-Anderson Act could be improved by controlling attorneys' fees and assuring that maximum resources are allocated to the payment of injured victims at a minimum cost to utility ratepayers or taxpayers.

(b) Any control of attorneys' fees should apply to both defense and plaintiff attorneys, but the greatest area of concern would appear to be in the area of plaintiffs' attorneys. The current system makes no provision to control or modify the normal contingency-fee arrangements even though many of the normal contingencies in a tort action have been eliminated or drastically altered through the waivers of defenses in case of an extraordinary nuclear occurrence.

The normal problems of excessive defense counsel expense encountered in most "mass-tort" litigation have, of course, been fairly well resolved through the economic channeling and omnibus features of Price-Anderson where a single law firm can be engaged to handle the single defense of all potentially liable defendants. With the inherent self-interest on the part of the nuclear insurers and licensed utility-reactor-operator to select proper counsel and to control his expense, there may be no real need to attempt to control defense attorney costs further.

From the plaintiffs' side, it would seem that either court-awarded or court-approved fees, or a predetermined scale of contingent fees would be desirable. If this were done, it should probably be coupled with a modification in the overall system such as limiting a plaintiff's recovery to economic damages with a specific award of attorney fees in addition to the recovery for damages.

Question 2. General Electric and other contractors are indemnified under Public Law 85-804 for various ultrahazardous activities undertaken pursuant to contracts with the Department of Defense. Unlike Price-Anderson, this indemnification does not cover losses to United States government property that arise out of the willful misconduct or bad faith of corporate officers or directors. This suggests that the scope of indemnification provided by Price-Anderson is broader than necessary to obtain essential contractor services involving the risk of catastrophic losses, contrary to the claims of contractors such as General Electric.

(a) Do you believe that corporations such as General Electric should be fully indemnified for radiological damages arising out of willful corporate misconduct?

(b) Why do companies such as General Electric engage in other ultrahazardous activities involving the risk of catastrophic losses for which they are indemnified for intentional misconduct to a lesser degree than under Price-Anderson?

Response:

(a) The legal definitions of, distinctions between, and actual application of the terms "negligence", "gross negligence" and "willful nisconduct" are so hazy and erratic as to make them meaningless. As I understand it today, these distinctions constantly shift and are really made in the course of a trial and ultimately decided by a jury, based upon the evidence submitted to the jury. To the extent I have been able to follow the trend of court and jury decisions in recent years, I have not been at all encouraged about the probability of seeing a commonly accepted and acceptable rule as to what constitutes either "gross negligence" or "willful misconduct."

With the highly emotional environment following a major nuclear incident, the political ramifications inherent in any decision as to where the ultimate cost may reside, and the remote (but not nonexistent) possibility of damages exceeding the levels of private financial protection, I do not personally believe any corporation can in good conscience and fairness to its share owners accept even a limited open-end liability beyond that covered by the terms of Price-Anderson if such exposure is based upon such unquantifiable terms as "gross negligence" or "willful misconduct."

(b) Many companies, including General Electric, have engaged in government contract work involving ultrahazardous activities, where governmental indemnification, such as under P.L. 85-804, does not apply to willful misconduct on the part of senior-management personnel within the corporation.

Most of these activities are in connection with defense contracts which involve a corporate decision as to its responsibility as a corporate citizen to participate in those areas of defense work where their particular expertise is required.

Furthermore, most of these activities have a long history; and commitments to accept a relatively minor limitation in the scope of indemnification were made when the extent of potential damages were not as severe and the concept of "willful misconduct" was felt to be understood on a more universal basis.

This distinction was recognized and reviewed with the Congress when Price-Anderson was first enacted and when Congress made the conscious decision that no such exception should be made in the nuclear area.

In recent years, many defense contractors have reviewed their exposures inherent in certain government contract areas and have expressed less than satisfaction with current indemnification authorities and implementations in the nonnuclear area. Rather than suggest that the Price-Anderson program adopt the restrictions inherent in other programs, I would suggest that other areas of truly catastrophic exposures should be reviewed with consideration of adopting a modified form of Price-Anderson to maximize the public protection and establish a fair balance of risk assumption among the many parties involved.

Question 3. Mr. Harkins has commented that excluding punitive damages from Price-Anderson coverage, as proposed in S. 1761, would result in a loss of "most if not all" of the litigation efficiencies of the present system. Mr. Harkins stated that defendants would not be expected to co-operate with each other because of fear that any adverse admissions would be used against them in the non-Price-Anderson litigation over punitive damages. Mr. Hall, you also testified that excluding punitive damages will destroy the channeling concepts of Price-Anderson.

Under the present system, claims for on-site damages are not covered by Price-Anderson.

Is there any evidence that the exclusion of on-site damages and the possibility that admissions made during litigation of off-site damages could be used in actions for on-site damages resulted in a loss of efficiency in resolving claims that are covered by Price-Anderson? Do you believe that an exclusion for punitive damages would cause a different impact upon the Price-Anderson system that the exlusion for on-site damages?

Response:

As discussed in my answers to questions #3 and #6 raised by Senator Simpson and as discussed in my original testimony, an exclusion of coverage for punitive-damages claims under Price-Anderson would undermine the whole concepts of "channeling" and "omnibus" coverage in Price-Anderson.

While conceptually the current exclusion of "on-site" damages might have similar consequences, there are means available to industry to resolve the on-site liability problems without upsetting the "channeling" and "omnibus" features of Price-Anderson.

As discussed in my response to question #6 raised by Senator Simpson, the on-site liability problem has been satisfactorily handled by the utilities, suppliers and insurers for those plants licensed to date. For future plants to be licensed, this problem can be resolved; and, if satisfactory arrangements cannot be agreed upon, a supplier has a clear option of refusing to supply equipment or services to a particular plant. While a legislative solution to the on-site liability problem might have certain advantages, it is clear that non-legislative solutions can be worked out. Such is not the case with liability for third-party claims whether they be of a punitive or compensatory nature, where the allocation of liability, extent of liability, and furnishing of financial protection must be set out in a statutory framework for the system to work at all.

Question 4. The testimony before the Committee has raised a concern over the inability to consolidate claims in a single federal district court in the absence of an extraordinary nuclear occurrence (ENO). I understand there may be constitutional problems in simply conferring federal court jurisdiction on state tort law claims. One possible way to avoid the constitutional issue might be to provide for a substantive rule of decision for the federal court to apply.

If we abolish the extraordinary nuclear occurrence test for determining federal court jurisdiction, then should we abolish the ENO test for the underlying substantive law as well and provide for strict liability for all nuclear incidents? If the ENO is abolished to overcome various procedural barriers to full and efficient compensation, then shouldn't similar substantive barriers be abolished as well?

Response:

If it is necessary to abolish the use of ENO test to consolidate claims in a single federal-district-court in order to expedite the judicious disposition of all claims, I would have no objection to such a move for establishing jurisdiction only. However, the ENO threshold must, in my opinion, be retained for other than jurisdictional purposes. If the ENO test were to be abolished completely, we would wind up with very expeditious but totally incorrect disposition of many claims resulting from "incidents" which would not meet the ENO test.

In 1966, industry and insurers agreed to the ENO principle and its waiver of virtually all normal defenses to bring into play what amounts to a rule of absolute liability in case of a serious off-site incident with a significant release of radiation off-site.

After lengthy discussion and with common agreement among government and industry representatives, it was firmly agreed, however, that a waiver of such defenses should not apply unless there were a significant release as measured by the criteria established by an ENO.

If the ENO test were to be completely eliminated, industry would be faced with a waiver of all normal defenses for any claim alleging exposure to radiation either on-site or off-site even where it could be clearly documented that all releases in the plant history were within accepted limitations.

Rather than establishing a prompt and expeditious method to resolve legitimate claims, such a move would establish a virtual program of entitlement where any person who felt he was exposed to radiation would have an easily enforceable claim against the utility plant-operator, who in turn would be stripped of all of his normal defenses and would be unable to properly defend himself. We would have no need for a Workers' Compensation program for employees working at a nuclear facility-- they would merely file claim against the utility operator, plant designer, or equipment supplier and convert their Workers' Compensation benefits to damages collectable under the tort system of the particular state in question. If employees did not do so, their Workers' Compensation insurers would do it for them.

In addition, the potential claims for "off-site" injury and damage would be limited only by the fertile imagination of the trial bar with all normal hurdles removed except to convince a jury of the extent of damages due and the causal relation between such damages and the nuclear plant in question.

The establishment of an ENO and the subsequent waivers of normal defenses made eminent good sense when it was adopted in 1966 and continues to do so today, but only if there is a reasonable threshold at which point the waivers become operative. One might question the technical soundness of any such threshold, and the current criteria are under regular review. There should, however, be no question that there should be such a threshold and different treatment of cases resulting from a truly unusual release and those allegedly resulting from normal operation of a facility which is subject to all kinds of regulations and controls as to permissible releases of radioactivity to the environs.

KC Hall:ojh
June 13, 1986

STATEMENT OF
AMERICAN NUCLEAR INSURERS
MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
ALLIANCE OF AMERICAN INSURERS
AMERICAN INSURANCE ASSOCIATION

BEFORE

THE SUBCOMMITTEE ON NUCLEAR REGULATION
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

May 13, 1986

I am Richard Schmalz, Counsel to American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters, the two Nuclear Pools known as ANI and MAELU. With me are Joseph Marrone, Vice President and General Counsel of ANI and J. Michael O'Connell, Manager of MAELU.

We appear today on behalf of the Nuclear Pools. The National Association of Independent Insurers, the Alliance of American Insurers and the American Insurance Association also join in our statement. The total membership of these organizations includes over 800 insurance companies, with virtually all of the major companies represented.

We appreciate your invitation to take part in these hearings. We understand that you are particularly interested in learning more about how the insurance market responds to the challenge of providing a stable, high-capacity market for the risks associated with the private development of nuclear power in the United States.

We will speak primarily from the viewpoint of the domestic, or United States portion, of a large international market for property and casualty insurance for all types of industrial risks. What we have to say, however, is so fundamental that we doubt there would be much disagreement among insurance underwriters on the other side of the waters.

Of all industrial activities, the generation of nuclear power surely ranks among the most difficult to insure in the private market. There is an exceedingly remote possibility of an accident which can cause substantial off-site bodily injuries and property damage. No one can predict the extent of such injuries or damage or what it might cost to compensate them under our tort liability system in the United States, which seems increasingly inclined to demand a risk free world. There is no actuarial basis, and probably never will be, for determining either insurance premiums or capacity commitments.

In previous testimony before this and other congressional committees we have stressed the key factors that will permit a private insurance market to function in the face of the special catastrophe risk of nuclear power development:

- Care must be taken not to saddle the nuclear industry with a cumulation of excessively heavy financial burdens. This will not automatically make plants safer or provide the public with more financial protection. In fact, in our judgment there is a strong probability that it will have the opposite effect.
- The principle of an absolute limitation on liability coupled with channelling must be retained. If not, there will be little if any nuclear liability insurance.
- The absolute limitation on liability must continue to apply to claims handling costs as well as to loss payments. Otherwise the amount of insurance available will drop substantially.

- Waiver of defenses must be confined to an extraordinary nuclear occurrence if we are to maintain third party liability capacity at present limits. Our tort stystem is notoriously prone to class action nuisance suits.
- The present scope of the Pools' coverage for sabotage and terrorist acts, which is exceedingly broad in relation to usual standards, represents the limit that is insurable in the private market. Broadening coverage for terrorist acts, often state supported and financed, would result in the withdrawal of capacity from the liability insurance program.

There are some positive legislative steps that could be taken that would help maintain and attract capacity:

- Maintain the abolute limitation on liability and claims handling costs at a reasonable amount.
- Eliminate punitive damages in connection with claims to which the financial protection applies.
- Provide for consolidation of all claims under Price-Anderson in one United States District court.

The first step is important as a signal to the market that the government is interested in keeping a reasonable balance between the financial risks of private industry and the government under a well run, safe program. The last two steps would help keep claims handling costs to a minimum and would make more of the financial protection available to the public for the compensation of actual injuries.

As we approach the expiration of the current extension of the Price-Anderson program, we have seen several proposals for renewal with a wide range of changes. They all appear to agree that its "positive" elements should be retained (that is, those features which enlarge the liability of the nuclear industry and increase the chances of obtaining compensation payments). When it comes to the matter of an off-setting balance, however, the proposals split into two camps.

For example, Mr. Seiberling's bill (H.R. 445) and Mr. Hart's bill (S. 445) would destroy the balance entirely by removing the limitation on liability. This would carry down the channelling concept with it. These proposals may have been encouraged in part by suggestions that removing the limitation on liability, or eliminating channelling, may stimulate more insurance capacity from private markets. Unfortunately, these suggestions, often from persons who are out of close touch with private insurance markets, are unreliable. The result would be at best a large loss of insurance capacity, and more likely a collapse of private insurance arrangements.

On the other hand, there are proposals like those of Congressman Price (H.R. 51) and Senators Simpson and McClure (S.1225) which do recognize the fundamental soundness of the Price-Anderson program, although they would adjust the balance between private and governmental responsibilities. Mr. Price's bill would double the amount of the retrospective premium payments from the nuclear reactor operators. The immediate effect would be to raise the total pool of private funds to approximately $ 1.1 billion. Obviously, the total funds could be raised to a higher amount simply by increasing the multiple. We favor Mr. Price's approach because it effectively increases capacity, while leaving intact the other essential concepts of a proven, workable concept.

S.1225 is more complex. It would require at least doubling, and would permit up to tripling, the retrospective premium payments from reactor operators. Then it would create a "third tier" of private financial protection in the amount of $500 million, funded by a kilowatt hour fee on electricity generated and sold by civilian nuclear power reactors.

The three tiered approach, as we understand it, would not damage the channelling and absolute limitation on liability principles that are essential for private insurance back-up. We do have some reservations, however, as to whether it is necessary or wise to complicate financial protection with a third tier funded by what is essentially a special sales tax. We recognize that certain precedents exist with respect to "Superfunds" for hazardous substances, but wonder where a proliferation of special tax supported funds will take us, with each fund "competing" for some special consideration. The hope of retaining a sound, general purpose compensation system seems doubtful.

The major feature of Senator Stafford's proposal (S. 1761) is the removal of the absolute limitation on liability and the substitution of an annual cap on the amount of retrospective premium that may assessed against each licensed power plant. The amount of the annual assessment, which is now $5 million maximum for an incident, increases to between $10 and $15 million annually. Such an increase may in itself be so large that it would seriously impair the financial stability of the nuclear industry if called into play. This could have an adverse effect on the industry's ability to serve its customers. Safety may suffer in the financial squeeze. The subrogation feature of the proposal seems only to introduce excessively high and wasteful transaction costs in view of the omnibus coverage principle built into the current financial protection requirements. To accomplish true loss shifting to suppliers would require removing them from the protection of the omnibus coverage feature. However, this would destroy the concept of channelling which is essential to maintaining private insurance markets in the face of an unquantifiable catastrophe risk.

In short, of the three specific Senate proposals that you have asked us to consider (S.445, S.1225 and S.1761), only S.1225 would appear to be insurable in the private insurance market. Here, as expressed earlier, any increased exposure to liability for terrorist acts would not attract support.

In the absence of actuarial data to support premium and capacity judgments, the private insurance market must take a long range view, and place heavy reliance on some firm principles that minimize the risk of adverse selection and cumulation of liability. This means that for practical purposes the market must be organized into pools, and that governments must define and limit the total exposure to loss in some reasonable way. This is the case in virtually every country (other than those with collectivist economies) that are currently developing nuclear power.

Technical analysis of insurance tends to idealize the whole private insurance mechanism as a monolithic "pool" of funds that deals with aggregated, rather easily quantifiable risks. The aggregate risks can then be broken down as finely as you like and assigned an actuarily precise "risk premium" for each separate part. Each underwriter then ought to be content to bear the risk for the assigned premium.

In reality, the insurance industry, both here and abroad, is characterized by low concentration and intense competition for business. No one insurance company or underwriter accounts for a major share of the market. Although a pool or a syndicate may sometimes exercise a lead role by reason of respect for its expertise and sound judgment, the market is, to a remarkably high degree, governed by classic free-market economic principles.

Under these conditions there is not, even in the short term, any validity to the idea that an underwriter "ought" to be content to bear a risk at any particular premium. The underwriter is going to make that judgment in accordance with the underwriter's personal evaluation of the risk related return. Thus, the Pools cannot dictate capacity; they can only solicit it, providing as much information as they reasonably can to to aid their participants in making an informed judgment. Nor can they, for the most part, allocate capacity at will to liability insurance or property insurance.

The Committee has asked us several detailed questions. Unfortunately, there appears to have been some delay at our end. We have done the best we could with answers to your questions in Appendix A. Several are quite similar to those that have been raised and answered earlier in testimony before Congress. To give you more information we have included some of these as separate appendices.

It is too early to tell what effect the recent Russian accident at Chernobyl will have on our nuclear power program, or on insurance capacity, but we would expect that if the program continues there will be an inclination to impose additional financial obligations on the nuclear industry. As we consider renewal of the Price-Anderson program, it occurs to us that we must take some care not to lose sight of the main question — Can nuclear power be produced safely in the United States by the plants now operating or which may come on line in the future?

If the answer to this question is truly in serious doubt, then from our perspective, at least, the program should be wound down. The addition of a few extra billions of dollars of potential financial liabilities on private industry would be a very poor trade-off if there were a truly serious danger to public health and safety.

In summary, we believe that if Congress wishes to continue to encourage the development of nuclear power while taking all reasonable steps to protect the public, the existing Price-Anderson program affords a sound base.

We think that the emphasis should now be placed on providing for measured increases of financial protection in amounts which can reasonably be absorbed by insurers and the nuclear power industry, confident that a sound ongoing program is in place for the future.

We will continue to support such a program and will make regular efforts to increase our capacity for nuclear insurance.

APPENDIX A

AMERICAN NUCLEAR INSURERS
MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS

Answers to Insurance Questions

from

ALAN K. SIMPSON, CHAIRMAN
UNITED STATES SENATE
SUBCOMMITTEE ON NUCLEAR REGULATION
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

May 13, 1986

1.

The channelling of liability feature contributes strongly to maximizing the liability insurance available for commercial nuclear accidents, to the efficient allocation of liability insurance capacity, and to the efficient settlement, adjudication and payment of public liability claims.

For additional comments on the importance of channelling, please see pages 2 and 5 of our statement, our answer to Senator Stafford's question 3 in Appendix B and our letter to Senator Simpson in Appendix D.

2.

The undercutting or elimination of the concept of channelling would consequently have a strong negative effect on the amount of liability insurance available, would greatly increase its cost, would tend to shift insurance capacity for nuclear risks to property insurance, and would greatly increase the amount of resources consumed in processing and defending claims. Had channelling not been in effect for the Three Mile Island accident, separate defenses would undoubtedly have been required for several potential supplier defendants. Modern tort jurisprudence is not distinguished for its ability to control litigation expense.

3.

A reasonable aggregate limit on liability coupled with channelling has a strong positive effect on the amount of liability insurance provided by insurance companies. An unreasonably high limit will result in a decrease in capacity out of concern that safety will be shortchanged. Elimination of the limit would probably result in the collapse of the channelling concept and withdrawal of underwriters generally from the market for nuclear liability insurance.

4.

We believe the major steps that could be taken by government to encourage insurance companies to provide greater amounts of liability insurance for commercial nuclear accidents are outlined on pages 2 and 3 of our statement. We know of no steps requiring companies to provide greater amounts of insurance that are likely to prove successful, for the reasons stated on pages 6 and 7 of our statement.

5.

As indicated by our answer to the previous question, we do not believe that it is necessary or advisable to have a legislative requirement that insurance companies provide a given amount of liability insurance. Such a requirement would probably cause a near total withdrawal from the market because compulsion only increases, rather than lessens, an already difficult risk. There is also no way for domestic companies to compel continued support from overseas reinsurance markets. This is not to say, however, that insurers would not be willing to consider setting reasonable targets and timetables.

6.

We do not believe that extension of the provisions of the Product Liability Risk Retention Act of 1981 would have any discernible positive effect on the availability and cost of nuclear liability insurance. We think nuclear liability insurance is too specialized to lend itself to a fragmented approach.

7.

The exclusion of defense costs from the amount of financial protection available would reduce the amount of nuclear insurance available for commercial nuclear accidents, would increase its cost, would tend to shift nuclear insurance capacity further toward the property damage coverage and would tend to increase claims handling costs. We do not believe the insurance market will write nuclear insurance without a limit on defense costs, so the question becomes whether there should be one combined limit or two separate limits. There is little doubt in the minds of insurers that you attract more capacity at lower cost with a combined single limit.

For additional information we refer you to our answers to Senator Stafford's question 7 in Appendix B and Senator Domenici's questions 13a and 13b in Appendix C.

8.

The elimination of punitive damages would have a positive effect on capacity and the allocation of liability insurance. It would also contribute to the more efficient handling of claims following a nuclear incident. The biggest beneficiaries would be those actually injured and who would suffer if the available resources were diverted to providing huge windfalls to a few.

S.1761 commendably makes a good beginning, but should be clarified to make sure that the ability to recover punitive damages from a licensee which furnishes financial protection is precluded.

For additional information we refer you to our answers to questions 15 and 16 from Senator Domenici in Appendix C.

9.

For general information concerning availability, cost, allocation and amount of nuclear liability insurance please refer to pages 6 and 7 of our statement. For additional information on availability and factors that bear on the relative risk between liability and property insurance, we refer you to our answer to Senator Stafford's question 1 in Appendix B. For a comparison with non-nuclear catastrophe risks, please see our answer to Senator Domenici's question 6 in Appendix C. Our answer to Senator Domenici's question 12 in Appendix C discusses the factors considered in setting insurance premium rates for the various utilities.

10.

A general comparative analysis of the impact of the three proposals pending before the Subcommittee is set forth on pages 4 through 6 of our statement. For a detailed analyis, please refer to the letter dated November 6, 1985 (Appendix D) from Richard A. Schmalz to Senator Alan K. Simpson, in connection with the hearing held before the Subcommittee on October 23, 1985. Of the three proposals only S.1225 is likely to be insurable in private markets. We do not believe that its fundamental design will adversely effect the amount of liability insurance available or the cost or allocation of liability insurance. Nor will it undercut the efficient handling of claims following a nuclear accident.

We do have, however, one caveat. We are uncertain as to the extent S.1225 has been amended to enlarge liability, or to affect the scope of the Pools' coverage for terrorist acts. In our judgment private insurers will not assume greater risk in this area. We have heard that the provision is only intended to "clarify" present law. If so, it is unnecessary and unfortunate to place stress on the matter at this time, for it gives the appearance that Congress intends to shift liability for state supported acts of terrorism to the private sector.

11.

It is clear that without Price-Anderson there would be little, if any liability insurance available to pay public liability claims. There would also be severe market problems for other kinds of insurance for homeowners and businesses located in the vicinity of nuclear power plants. Appendix D gives an explanation of the important role Price-Anderson plays in encouraging insurance markets affected by the catastrophe potential from nuclear power.

APPENDIX B

AMERICAN NUCLEAR INSURERS
MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS

Answers to Insurance Questions

from

ROBERT T. STAFFORD, CHAIRMAN
UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

February 28, 1986

1.

Why are the insurance pools willing to provide more insurance for on-site property damage than for off-site damages? Isn't the risk of having to pay out claims much greater for on-site damages?

A.

"Risk", in the insurance sense, is not merely "having to pay out claims", but rather the amount of uncertainty surrounding the timing, frequency and amount of the payments that will be called for under the insurance contract. Using this standard, the world insurance market judges the risk associated with writing off-site damages insurance (third party liability coverage) for nuclear power plants somewhat greater than for on-site damage insurance (property coverage).

The main reason for this judgment is that the risk in underwriting nuclear liability insurance involves the coincidence of two elements that are each marked with great uncertainty. When or how often a large-scale, off-site nuclear accident will happen is virtually unpredictable. If it should occur, the damages could vary widely by chance. And the dollar consequences would then be determined by an uncertain standard (tort law).

On-site damage claims, on the other hand, are not confined to those arising from such catastrophes, and the amounts are governed mainly by the value of the property covered. The timing and frequency of these lesser incidents, at least, appear to be influenced by engineering design and maintenance. While property damage accidents are expected to be more frequent than off-site accidents, their cost is far less uncertain.

The Pools' studies, and their actual experience since 1957 in soliciting world-wide insurance capacity for both lines of nuclear insurance, show that capacity is not elastic. Beyond a certain point, substantial increases in premium will not produce substantial increases in capacity. Capacity tends to grow in steps, and is influenced by conditions within the insurance industry generally, as well as the health of our nuclear power program.

Because world capacity is finite, the total must be allocated to the two separate lines -- property damage insurance and third party liability insurance. The Pools cannot control this allocation. In most cases, the individual participants in the Pools make their own independent judgments as to how much they wish to commit to each line. But in the final analysis, the allocation is determined mainly by market forces, modified to some extent by the Price-Anderson financial protection requirements.

The most important factors bearing on the allocation of capacity are the cost and terms of:

(a) the Pools' third party liability coverage;

(b) the Pools' property damage insurance;

(c) the property insurance provided by the utility industry's offshore captives;

(d) the secondary financial protection, or Retrospective Premium Assessment Plan.

Originally, the total private insurance capacity for nuclear risks was $120 million for each nuclear incident at a separate location, allocated in equal amounts to the property damage and the third party liability coverages. Today, the total capacity of the Pools is $775 million.

A major substantive difference between the Pools' insurance and the other forms of protection mentioned is that the Pools' coverage is entirely pre-funded. The $775 million is payable from the insurers' special reserve fund (accumulated through the long-term Industry Credit Rating Plan) and from their general surplus accounts. Although the utility industry's captives do accumulate some reserves, most of their capacity is based on post loss assessments.

Since the adoption of the Retrospective Premium Assessment Plan (1977), the Three Mile Island accident (1979) and the expanded operations of the utility captives, the demand for the Pools' insurance has been heavier on the property side. This is where a major portion of the market for nuclear insurance (almost exclusively limited to the nuclear utilities) perceives the greatest need for the Pools' pre-funded, or "guaranteed cost" insurance. At present, the Pools have $190 million available for third party liability insurance ($30 million is used to back-up the Retrospective Premium Assessment Plan) and $585 million for property coverage.

One lesson from Three Mile Island is that the cost of decontaminating even a relatively small on-site release is much higher than previously thought, and that the lack of adequate funds for this purpose slows down the process, exposing the public to greater risk of bodily harm as well as increased costs. Thus, from public safety and financial considerations it is important to maintain adequate financial protection for both on and off-site damage.

3.

If the liability of the insurance pools is limited to the amount of the insurance that the pools are willing to provide, what difference does it make to the pools whether the liability of the pools is limited, limited on an annual basis, or unlimited?

A.

The private insurance market generally operates on an annual accounting and marketing basis. That is, most people buy a years' worth of insurance for all losses assignable to the policy year for a price that reflects as accurately as possible the losses that are expected to become payable for that year. To develop insurance capacity for such a system requires that the losses that will become payable each year under any particular policy must be predicatable within reasonable limits. And the best predictor is usually a credible base of past loss experience.

When the decision was made in the 1950's to encourage the development of nuclear power by private sources, a totally new source of risk was created which had three distinctive characteristics:

- Under certain circumstances a terrible catastrophe could occur which might result in many bodily injuries and extensive property damage to persons and property located in the vicinity of the striken power plant.
- The probability of such a catastrophe actually happening, while not susceptible of precise calculation, was nevertheless exceedingly remote.
- The highest risk would be confined to those within a relatively short distance from a relatively few locations (the sites of the nuclear power plants). In a large country, such as the United States, a very large portion of the total population would remain essentally risk-free.

The consensus was that the overall risk was reasonable, provided that those subject to the risk could be protected by high safety standards and by adequate financial relief should the catastrophe actually occur.

The three characteristics of the new risk make it virtually impossible to develop a conventional private insurance market for the financial losses that might occur. Our previous discussion has brought out the unpredictable nature of the financial consequences. There is no way of relating any estimated probability of loss to any one policy for any given year. And only a relatively small proportion of the public is subject to the risk of loss.

Experience with the flood hazard, which has similar characteristics, has shown that even those persons who choose to live in flood zones will not generally buy coverage even if it is made available to them at highly subsidized rates. Private insurance markets operating under competitive conditions cannot force people to buy what they do not want. Only the government can do that.

The alternatives then were to develop a full command and control, government operated financial protection system for the newly created nuclear energy hazard or to create some system that would give private insurance markets (and the nuclear industry) a substitute for the fundamental unpredictability of nuclear catastrophe losses. A comprehensive, government operated substitute for private third party liability and property insurance for all homeowners and businesses subject to the new risk faced the same lack of an adequate data base as private insurers, and the same problem of determing appropriate annual premiums for the nuclear risk. It faced the same problem of adverse selection. It would have to "give the coverage" away or take all the flak if it attempted to set "actuarially" sound rates in the absence of loss experience.

In retrospect, the government wisely chose not to try to do the impossible -- that is, to attempt to set up a conventional, actuarially oriented approach to dealing with the nuclear risk. For today, it is the insurance industry that is forced to explain why such an approach is still not appropriate and is likely to remain so indefinitely.

Instead, the government chose a much less perilous, and much sounder course. It created a substitute for the adverse selection problem by channeling all liability for nuclear accidents to the nuclear power plants, and a substitute for the unpredictability problems by placing an overall cap on the aggregate liability of all persons involved. And finally it made a commitment, not on any actuarial basis, but out of common good sense, to step in and provide appropriate supplemental compensation to the public in the extremely unlikely case that the costs of an actual nuclear incident do exceed the cap.

The elegance and soundness of this plan lie in its simplicity and sense of balance in meeting a few clearly defined objectives. If the goal was to encourage the development of nuclear power by private enterprise, it succeeded, at least until this goal became muddy. If the goal was to permit normal insurance markets to provide third party liability and property insurance to persons in the vicinity of nuclear power plants, it has been an unqualified success. There have been no tight markets or rate increases for conventional insurance due to the nuclear risk.

If the objective was to encourage maximum insurance for the nuclear risk in the face of an almost overwhelming set of most unfavorable characteristics, it has succeeded. Price-Anderson is a model for the efficient marshalling of capacity for the newly emerging concepts of collective enterprise liability. If the objective is to provide full financial protection to the public, it far surpasses the potential performance of any system in place today in the United States, or any where else in the world. The primary and secondary financial protection in place greatly exceeds that normally available or maintained by any private enterprises. And it is supplemented by the full faith and credit of the government to provide any additional compensation required.

But what is likely to happen if the cap on liability is removed, or an annual limit substituted? The channeling concept breaks down because the possibility then is open to multiple lawsuits against persons other than the powerplant operators. As a practical matter, the insurance industry will be confronted with a competing demand for nuclear liability coverage. If it does not respond it will face the usual pressures that tight markets bring. If it does respond, it will not be able to maintain its commitments to the Pools. Certainty as to the industry's maximum insured nuclear loss will be replaced by the uncertainty that grows out of the threat of uncontrollable cumulations of liability from many sources. The stabilizing effect of the Industry Credit Rating Plan on rates and capacity will be lost. Instead of being readily available at reasonable cost, nuclear liability and property coverage will join the list of the unpredictable lines of insurance, such as pollution, professional and products liability coverages. It will become hard to place, more expensive, and may well disappear.

The Pools believe that the continued ability of private insurers to main orderly markets for nuclear liability and property insurance at high levels depends on an absolute cap on the limit of liability of all persons who may be responsible for a nuclear incident. They also believe that the absence of a cap, coupled with the disruption of the insurance industry's ability to make a maximum contribution to the nuclear risk through the Pools, will increase the pressure to outlaw the current nuclear exclusions in liability and property insurance policies. This would lead to the withdrawal of private insurers from writing conventional coverages in the vicinity of nuclear power plants. Some government sponsored or dictated response would be required, with all the attendant problems that the Price-Anderson system has avoided for the last 29 years.

7.(a)

How would the exclusion of punitive damages from Price-Anderson coverage affect the amount and cost of insurance available for other types of damages?

A.

The exclusion of punitive damages would probably not have a direct effect on the rates for nuclear liability insurance. It might help the Pools attract more capacity. The reason that the effect would be somewhat limited is that, at the primary level, a moderately large accident would probably exhaust the primary layer through emergency assistance payments and compensatory settlements.

(b)

If punitive damages were excluded from Price-Anderson coverage (such as proposed in S.1761), would the insurance pools nevertheless provide coverage for punitive damages?

A.

As long as it would not be contrary to public policy to do so, or would not make the Pools' coverage unacceptable as financial protection, the Pools would endeavor to continue to provide the same coverage they provide today.

(c)

If the answer to (b) is yes, would this coverage for punitive damages displace funds available to compensate victims of the activity giving rise to the punitive damages?

A.

Yes; it would have such an effect. Punitive damages generally, but especially in a catastrophe situation, constitute a windfall to a few at the expense of many other injured persons. In the Price-Anderson context, punitive damages also undercut the Nuclear Regulatory Commission's authority and responsibility with regard to safety regulation.

The Pools strongly support the banning of any recovery for punitive damages for those nuclear accidents for which financial protection is required under Price-Anderson.

APPENDIX C

AMERICAN NUCLEAR INSURERS
MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS

Answers to Insurance Questions

from

PETE V. DOMENICI, CHAIRMAN
SUBCOMMITTEE ON ENERGY AND RESEARCH DEVELOPMENT
OF THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

July 2, 1985

---

6. How are other non-nuclear, potentially-catastrophic risks covered within the insurance industry? How much coverage is generally available for other industries with high risks (the chemical industry, explosives, oil-well drilling)? Is the amount of liability coverage available within the nuclear industry generally higher than that normally available in other high-risk industries?

Perhaps it may be said as a general rule that, for the industries mentioned, coverage is not written through pools, but through ad hoc arrangements which involve many intricate layers of primary and excess coverage placed in world markets. The amount of coverage available varies substantially, even over short intervals. Usually, when there have been no serious losses for a few years, capacity rises. A bad turn of events will result in sharp drops and substantial premium increases.

In most non-nuclear industrial activities, even those considered to be high-risk, there is neither the size-of-loss potential that is associated with nuclear power, nor the so-called "long tail" factor: that is, the rating problem that results when the bulk of injuries do not become manifest until years after the accident. This is less true of the chemical industry, which has just had the largest industrial accident in history, while being simultaneously burdened with the hazardous wastes problem. The chemical industry is much larger than our nuclear power industry, but nevertheless, coverage for gradual pollution has all but disappeared. And since Bhopal, even coverage for sudden and accidental pollution has been reported as "extraordinarily difficult to buy."

The performance of the nuclear pools has been much more stable in maintaining high limits of insurance available. They began with a capacity of $60 million in 1957 (about 6 times higher than the amount generally available at that time). Their capacity is now $190 million ($30 million of this is reserved to backup the second layer of financial protection). It is highly doubtful that this figure can be matched today for many non-nuclear lines having a comparable, or even lesser loss potential, should a catastrophic accident occur.

12. What factors do you consider in setting insurance premium rates for the various utilities?

The primary factor used to reflect variations in risk among nuclear power plants is underwriting judgment, taking into account any actual loss and operating experience available. The objective is to modify individual risk premiums in a fair, rational manner to correspond with comparative risk.

The nuclear pools consider the following risk characteristics in rating commercial power reactors —

1. Type,
2. Size,
3. Location,
4. Containment,
5. Operating Experience.

"Size" and "Location" are usually the most variable factors and have the greatest effect on premiums. The relative risk attributed to "Size" is based on engineering evaluations of the exposures presented at various power levels. If all other risk characteristics are equal, a larger reactor will pay more in premium than a smaller unit.

The underwriting evaluation of the "Location" exposure centers around population densities and offsite property values. Such things as seismology, meteorology, hydrology and containment are also considered. Again, with all other risk characteristics equal, a reactor located in an environment with higher population densities and property values will pay a higher premium.

In evaluating risk variation due to "Operating Experience", underwriters consider such factors as radiation exposures to onsite personnel, offsite releases, NRC violations, abnormal occurrences, low-level waste shipments and compliance with the Pools' engineering recommendations.

Liability premiums are adjusted annually to reflect changes in risk characteristics and inflation. Premiums vary substantially from site to site, currently ranging from about $286,000 to $837,000 a year for $160 million of coverage.

13a What is the normal policy of the insurance industry for coverage of the costs of investigation and settlement of claims? What is the normal practice for nuclear insurers?

The normal policy for primary insurers providing fairly low limits of coverage has been to pay such "defense costs" in addition to the limits for liability payments. The practice of excess insurers has generally been to include defense costs and liability payments under one limit, although in some cases no defense costs are covered, and in others the practice of primary insurers is followed.

The normal practice for nuclear insurers is to include both defense costs and liability payments within the limit of coverage. This practice has been followed since 1957, as it maximizes capacity.

A consensus is now developing in world insurance markets that the nuclear practice should be adopted for standard commercial liability policies. Insurance Services Office, which prepares standard liability policies widely used by the insurance industry, plans to introduce new standard policies incorporating this change in 1986.

13b If costs of investigation and settlement of claims were excluded from Price-Anderson coverage, would this reduce the capacity of the insurance pools? Why or why not?

Such a change would reduce the capacity of the insurance pools substantially for two reasons. It would be contrary to the direction in which the world insurance markets are moving. But more important is the fact that open-ended defense obligations in addition to high limits for liability payments add up to larger and more unpredictable total risk. This means that substantially less capacity will be available at any given premium level. This is why insurers will be shifting generally to the more efficient Price-Anderson system.

15. In Commissioner Bernthal's testimony, he addressed the issue of punitive damages. In his opinion, if punitive damages were allowed to be paid with Price-Anderson insurance funds, this would remove the deterrent value of such damages, because the insurance pools, and not the utility at fault, would be responsible for the payments. Do you agree with Commissioner Bernthal that punitive damages should not be insurable under the Price-Anderson Act?

We would agree with what we take to be the sense of Commissioner Bernthal's remarks, although our own views may go beyond his.

We believe that no punitive damages should be recoverable in any case where the injury or damage is subject to the financial protection requirements of Price-Anderson, with the possible exception of injury or damage caused by willful or wanton misconduct which a trier of fact finds, on the basis of clear and convincing evidence, to be equivalent to an actual intention to do harm. In such a case, punitive damages should not be insurable, because, as Commissioner Bernthal points out, this would remove the deterrent value of such damages.

Under the law of some states, however, it is possible to recover punitive damages for the conduct of others under the theory of vicarious liability, or even for conduct that is virtually indistinguishable from ordinary negligence. Although insurers deplore such practices as an abuse of tort law, they are generally willing to provide coverage for punitive damages in such cases unless it is against the public policy of the applicable state law.

16. Commissioner Bernthal also commented on the Silkwood decision, in which the Supreme Court held that a state may award punitive damages against an entity regulated by NRC for actions the jury finds negligent, even though no NRC regulations were violated. In Commissioner Bernthal's opinion, this decision sets a bad precedent, because it in effect allows "every jury in America ... (to) theoretically serve as its own Nuclear Regulatory Commission."

Do you agree with Commissioner Bernthal's opinion? Do you feel that Congress should amend the Atomic Energy Act to reaffirm its principle that a licensee fully in compliance with NRC regulations should not be held liable for punitive damages?

Yes, we agree with Commissioner Bernthal's opinion. It is well stated, and by no means an exaggeration. In the framework of modern tort law in the United States, even threats of punitive damages cause a substantial diversion of resources from the purpose of providing compensation to the many deserving accident victims, while providing windfalls to others.

As we indicated in our answer to the previous question, however, we would apply the principle of eliminating punitive damage recoveries more broadly than just for cases of compliance with NRC regulations. Any such violations are already subject to fines and penalties, which can be toughened, if that seems appropriate. We believe that Price-Anderson was intended to be a compensatory system. The pressure to increase the limitation on liability indicates that there may be a shortage of funds for such purpose.

APPENDIX D

Richard A. Schmalz
212 Pattonwood Drive
Southington, CT 06489
(203) 747-5332

November 6, 1985

Senator Alan K. Simpson,
United States Senate
Committee on Environment and Public Works
Washington, DC 20510

Dear Senator Simpson:

During my testimony before the Subcommittee on Nuclear Regulation on October 23, 1985 you asked me to provide my analysis of the impact of the various bills dealing with Price-Anderson modification on insurance availability.

There are five different risk groups that must be considered:

A. Nuclear power plants (liability and property insurance).
B. Suppliers of nuclear specialty goods and services, such as the large "prime" contractors and their major subcontractors (liability insurance).
C. The more remote tiers of suppliers, such as those supplying generic parts and equipment (liability insurance).
D. Owners of commercial and residential property located in the vicinity of nuclear power plants (property insurance).
E. Risks with no exposure to the nuclear energy hazard.

These groups are roughly ordered by increasing size and decreasing degree of control or involvement in relation to the major risk associated with nuclear power. For example, there are but 96 risks in group A and only a few hundred in group B. There are perhaps a few thousand risks in group C. The risks in group D number in the millions, but the size of this group is relatively small compared with group E.

The major insurance risk from nuclear power is the possibility of a catastrophe involving the release of substantial amounts of fission products off-site. Such an event is believed to be extremely unlikely, and its timing, location and financial consequences are unpredictable. Moreover, the risk is concentrated at 96 locations within the United States. As noted above, most of our population and industries do not face the risk. This presents an adverse selection problem in attempting to provide property damage coverage directly to group D that is even more severe than that arising in connection with flood insurance.

Another complicating factor is that under modern tort liability rules even the most remote supplier of a defective product can be held jointly and severally liable for the entire loss regardless of the relative contribution of the product to the loss.

Under these conditions it is virtually impossible to develop significant private insurance capacity, or any solid amount of financial protection to the public, by using the conventional method of providing separate policies of liability and property insurance to each person or organizations who wishes to buy it.

It is possible, however, to obtain substantial capacity from private insurance markets, and solid additional finacial protection from private funds, by:

1. Channelling all liability and property insurance to the nuclear power plant operators,
2. Using an industry rating plan which spreads losses over a long period of time,
2. Limiting the plant operators' total (channelled) liability to a reasonable amount, so that the viability of the program is not destroyed by bankruptcies, and
3. Supplementing any inadequacy in the funds from the private sector by government indemnification.

Such an approach gives a very high degree of financial protection to the public, while encouraging the private insurance market to maximize its capacity at reasonable cost. It does so by freeing the market from the risk of severe overlining in attempting to meet the cumulative demands for coverage from groups A, B, C and D. It also avoids the problem of adverse selection caused by the disparity in the size of groups D and E. And it provides a stable premium base for the primary and secondary layers of financial protection.

This is the approach developed by the Price-Anderson program and adopted, in large part, by virtually all the market oriented economies that are developing nuclear power. It is universally recognized as having the added advantage of eliminating costly cross actions for indemnity and contribution among the members of groups A, B and C.

Taken together these factors create a climate which is favorable to obtaining from world markets substantial private insurance capacity at reasonable cost. In their absence, it is doubtful that much insurance would be available for those risk groups (A through D) that are exposed to the nuclear energy hazard. Certainly, the aggregate amount would be far less than today.

Using these principles, one can predict the general reaction of private insurers in this country and abroad to the various proposals for changes in the present Price-Anderson Program. In cases where some of the favorable conditions have been maintained, but others diminished, it may not be possible to assess accurately the extent of damage to the private insurance market.

Mr. Price's bill (H.R.51) would double the present maximum retrospective premium assessments, raising the total pool of private funds to about $1.2 billion, but leaving the remainder of the program intact. Insurers would regard this as a simple, effective approach to increasing the contribution of private sector financial protection. There should be no adverse effect on insurance capacity.

Insurers would not regard S.1225 (introduced by Mr. Simpson and Mr. McClure) quite as favorably because it imposes a much higher financial burden on the nuclear power plant operators. It permits a tripling of the present maximum retrospective premium assessment, and creates a third layer of $500 million of private financial protection to be funded by a kilowatt hour fee on electricity generated by nuclear power plants.

We have reservations about whether the third tier is necessary or wise, because it creates an automatic, tax supported funding plan which may ultimately supplant private insurance. However, S.1225 probably would not have any immediate adverse effect on capacity.

On the other hand, bills such as H.R.2665 (Mr. Weiss), H.R.445 (Mr. Seiberling) and S.445 (Mr. Hart) would remove the limitation on liability entirely. This destroys the economic balance which makes the channelling concept workable, and raises constitutional questions as to an industry wide assessment plan. The immediate effect of such bills would be a sharp reduction in capacity for insurance to meet financial protection requirements, as well as a drop in the amount of property insurance for nuclear power plants. In the longer term, heavy pressure will be placed on the nuclear exclusions contained in conventional liability and property insurance policies. Should the nuclear exclusions fail, private markets for conventional liability and property insurance will dry up for all risks subject to the nuclear catastrophe hazard.

Bills such as S.1761 (Mr. Stafford) and H.R ___ (recently proposed by Mr. Udall), while to outward appearances more moderate, will most likely be perceived by private insurers as imposing such heavy financial burdens on the nuclear power industry that they will regard nuclear insurance as too risky a venture to warrant continued support under existing liability and property programs. Both place the limitation on liability at such a high level that they will encourage perpetuation of the current tort law extravaganza.

The continued financial good health of the nuclear power industry following a catastrophe is important for two reasons. First, poor financial health increases the morale hazard; it may undercut safety. Second, nuclear insurance is largely catastrophe insurance. It is not possible to match annual premium flows to annual losses. Thus, adequate premiums can only be achieved on a long term basis. The high post loss assessment liability may seriously impair the continued viability of the nuclear power program, should a catastrophe occur. Even without a guaranteed pot of gold in the billions of dollars, our tort liability system is already imposing extremely high financial burdens on industry with its ever expanding recognition of new "damages" to compensate.

In summary, the only formal proposals of which we are aware that would not lead to substantial loss of private insurance capacity and serious market problems, if enacted in their present form, are H.R.51 and S.1225.

Very truly yours,
s/ Richard A. Schmalz

Richard A. Schmalz
212 Pattonwood Drive
Southington, CT 06489
(203) 747-5332

March 24, 1986

Robert T. Stafford, Chairman
United States Senate
Committee on Environment and Public Works
Washington, DC 20510

Dear Senator Stafford:

Thank you for your letter of February 28, 1986, enclosing additional questions relating to the nuclear insurance pools. We are pleased to submit the following on behalf of American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters.

We have answered all of the questions except number 6., which deals with the profits made through providing primary financial protection. Such information is not immediately available on a consolidated basis for both pools for all years since 1957. However, we are in the process of reconstructing the data and hope to have a report for you within a few days.

Sincerely yours,

Richard A Schmalz

Richard A. Schmalz

AMERICAN NUCLEAR INSURERS
MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS

Answers to Insurance Questions

from

ROBERT T. STAFFORD, CHAIRMAN
UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

February 28, 1986

1.

Why are the insurance pools willing to provide more insurance for on-site property damage than for off-site damages? Isn't the risk of having to pay out claims much greater for on-site damages?

A.

"Risk", in the insurance sense, is not merely "having to pay out claims", but rather the amount of uncertainty surrounding the timing, frequency and amount of the payments that will be called for under the insurance contract. Using this standard, the world insurance market judges the risk associated with writing off-site damages insurance (third party liability coverage) for nuclear power plants somewhat greater than for on-site damage insurance (property coverage).

The main reason for this judgment is that the risk in underwriting nuclear liability insurance involves the coincidence of two elements that are each marked with great uncertainty. When or how often a large-scale, off-site nuclear accident will happen is virtually unpredictable. If it should occur, the damages could vary widely by chance. And the dollar consequences would then be determined by an uncertain standard (tort law).

On-site damage claims, on the other hand, are not confined to those arising from such catastrophes, and the amounts are governed mainly by the value of the property covered. The timing and frequency of these lesser incidents, at least, appear to be influenced by engineering design and maintenance. While property damage accidents are expected to be more frequent than off-site accidents, their cost is far less uncertain.

The Pools' studies, and their actual experience since 1957 in soliciting world-wide insurance capacity for both lines of nuclear insurance, show that capacity is not elastic. Beyond a certain point, substantial increases in premium will not produce substantial increases in capacity. Capacity tends to grow in steps, and is influenced by conditions within the insurance industry generally, as well as the health of our nuclear power program.

Because world capacity is finite, the total must be allocated to the two separate lines -- property damage insurance and third party liability insurance. The Pools cannot control this allocation. In most cases, the individual participants in the Pools make their own independent judgments as to how much they wish to commit to each line. But in the final analysis, the allocation is determined mainly by market forces, modified to some extent by the Price-Anderson financial protection requirements.

The most important factors bearing on the allocation of capacity are the cost and terms of:

(a) the Pools' third party liability coverage;

(b) the Pools' property damage insurance;

(c) the property insurance provided by the utility industry's offshore captives;

(d) the secondary financial protection, or Retrospective Premium Assessment Plan.

Originally, the total private insurance capacity for nuclear risks was $120 million for each nuclear incident at a separate location, allocated in equal amounts to the property damage and the third party liability coverages. Today, the total capacity of the Pools is $775 million.

A major substantive difference between the Pools' insurance and the other forms of protection mentioned is that the Pools' coverage is entirely pre-funded. The $775 million is payable from the insurers' special reserve fund (accumulated through the long-term Industry Credit Rating Plan) and from their general surplus accounts. Although the utility industry's captives do accumulate some reserves, most of their capacity is based on post loss assessments.

Since the adoption of the Retrospective Premium Assessment Plan (1977), the Three Mile Island accident (1979) and the expanded operations of the utility captives, the demand for the Pools' insurance has been heavier on the property side. This is where a major portion of the market for nuclear insurance (almost exclusively limited to the nuclear utilities) perceives the greatest need for the Pools' pre-funded, or "guaranteed cost" insurance. At present, the Pools have $190 million available for third party liability insurance ($30 million is used to back-up the Retrospective Premium Assessment Plan) and $585 million for property coverage.

One lesson from Three Mile Island is that the cost of decontaminating even a relatively small on-site release is much higher than previously thought, and that the lack of adequate funds for this purpose slows down the process, exposing the public to greater risk of bodily harm as well as increased costs. Thus, from public safety and financial considerations it is important to maintain adequate financial protection for both on and off-site damage.

2.

A.

In the 1950's one reason for the inability of the nuclear industry to obtain nuclear insurance was the lack of actuarial experience. The United States has approximately 850 reactor-years of operating experience since 1957. Given this experience, why has the amount of primary insurance actually declined in constant dollars?

We wish to clarify an unfortunate impression that may be drawn from the question. Nuclear insurance did not exist until 1957, when it was created out of whole cloth and tailored to the Price-Anderson system. Since that time there has never been an "inability" of the nuclear industry to obtain nuclear insurance in amounts at least as high as that generally available for other comparable industrial risks.

The lack of actuarial experience noted at that time refers to the fact that there was no large body of data concerning accident frequency and loss costs. This is still true today, fortunately, and, upon reflection, will necessarily always be the case. If we were to have a sizeable number of catastrophic accidents the program would be shut down. So we can never expect a volume of credible accident frequency and loss cost data.

This will continue to be a handicap to underwriters in setting rates for nuclear insurance and in assessing the nuclear risk for the purpose of allocating capacity, but this deficiency has been overcome largely by two key provisions of the Price-Anderson Act — the channelling of all liability to nuclear power plants and the placing of a reasonable cap on that aggregate liability. These key provisions make up for the lack of adequate loss data.

The reactor years of operating experience tell us nothing directly about the probable distribution and amount of accident costs, and are, therefore, of limited value in making insurance capacity judgments. They are more useful on the property damage side, but even in that case reactor operating experience cannot be used for establishing rates. It is, however, taken into account in rating individual power plants.

As indicated in our answer to the previous question, the allocation of nuclear capacity to the primary financial protection is a complex matter that is not directly related to reactor years of operating experience. At best, this experience acts as a barometer for the aggregate nuclear risk. And in this regard, the Pools' have more than matched inflation or the performance of the general insurance market for comparable risks.

3.

If the liability of the insurance pools is limited to the amount of the insurance that the pools are willing to provide, what difference does it make to the pools whether the liability of the pools is limited, limited on an annual basis, or unlimited?

A.

The private insurance market generally operates on an annual accounting and marketing basis. That is, most people buy a years' worth of insurance for all losses assignable to the policy year for a price that reflects as accurately as possible the losses that are expected to become payable for that year. To develop insurance capacity for such a system requires that the losses that will become payable each year under any particular policy must be predicatable within reasonable limits. And the best predictor is usually a credible base of past loss experience.

When the decision was made in the 1950's to encourage the development of nuclear power by private sources, a totally new source of risk was created which had three distinctive characteristics:

- Under certain circumstances a terrible catastrophe could occur which might result in many bodily injuries and extensive property damage to persons and property located in the vicinity of the striken power plant.
- The probability of such a catastrophe actually happening, while not susceptible of precise calculation, was nevertheless exceedingly remote.
- The highest risk would be confined to those within a relatively short distance from a relatively few locations (the sites of the nuclear power plants). In a large country, such as the United States, a very large portion of the total population would remain essentally risk-free.

The consensus was that the overall risk was reasonable, provided that those subject to the risk could be protected by high safety standards and by adequate financial relief should the catastrophe actually occur.

The three characteristics of the new risk make it virtually impossible to develop a conventional private insurance market for the financial losses that might occur. Our previous discussion has brought out the unpredictable nature of the financial consequences. There is no way of relating any estimated probability of loss to any one policy for any given year. And only a relatively small proportion of the public is subject to the risk of loss.

Experience with the flood hazard, which has similar characteristics, has shown that even those persons who choose to live in flood zones will not generally buy coverage even if it is made available to them at highly subsidized rates. Private insurance markets operating under competitive conditions cannot force people to buy what they do not want. Only the government can do that.

The alternatives then were to develop a full command and control, government operated financial protection system for the newly created nuclear energy hazard or to create some system that would give private insurance markets (and the nuclear industry) a substitute for the fundamental unpredictability of nuclear catastrophe losses. A comprehensive, government operated substitute for private third party liability and property insurance for all homeowners and businesses subject to the new risk faced the same lack of an adequate data base as private insurers, and the same problem of determing appropriate annual premiums for the nuclear risk. It faced the same problem of adverse selection. It would have to "give the coverage" away or take all the flak if it attempted to set "actuarially" sound rates in the absence of loss experience.

In retrospect, the government wisely chose not to try to do the impossible -- that is, to attempt to set up a conventional, actuarially oriented approach to dealing with the nuclear risk. For today, it is the insurance industry that is forced to explain why such an approach is still not appropriate and is likely to remain so indefinitely.

Instead, the government chose a much less perilous, and much sounder course. It created a substitute for the adverse selection problem by channeling all liability for nuclear accidents to the nuclear power plants, and a substitute for the unpredictability problems by placing an overall cap on the aggregate liability of all persons involved. And finally it made a commitment, not on any actuarial basis, but out of common good sense, to step in and provide appropriate supplemental compensation to the public in the extremely unlikely case that the costs of an actual nuclear incident do exceed the cap.

The elegance and soundness of this plan lie in its simplicity and sense of balance in meeting a few clearly defined objectives. If the goal was to encourage the development of nuclear power by private enterprise, it succeeded, at least until this goal became muddy. If the goal was to permit normal insurance markets to provide third party liability and property insurance to persons in the vicinity of nuclear power plants, it has been an unqualified success. There have been no tight markets or rate increases for conventional insurance due to the nuclear risk.

If the objective was to encourage maximum insurance for the nuclear risk in the face of an almost overwhelming set of most unfavorable characteristics, it has succeeded. Price-Anderson is a model for the efficient marshalling of capacity for the newly emerging concepts of collective enterprise liability. If the objective is to provide full financial protection to the public, it far surpasses the potential performance of any system in place today in the United States, or any where else in the world. The primary and secondary financial protection in place greatly exceeds that normally available or maintained by any private enterprises. And it is supplemented by the full faith and credit of the government to provide any additional compensation required.

But what is likely to happen if the cap on liability is removed, or an annual limit substituted? The channeling concept breaks down because the possibility then is open to multiple lawsuits against persons other than the powerplant operators. As a practical matter, the insurance industry will be confronted with a competing demand for nuclear liability coverage. If it does not respond it will face the usual pressures that tight markets bring. If it does respond, it will not be able to maintain its commitments to the Pools. Certainty as to the industry's maximum insured nuclear loss will be replaced by the uncertainty that grows out of the threat of uncontrollable cumulations of liability from many sources. The stabilizing effect of the Industry Credit Rating Plan on rates and capacity will be lost. Instead of being readily available at reasonable cost, nuclear liability and property coverage will join the list of the unpredictable lines of insurance, such as pollution, professional and products liability coverages. It will become hard to place, more expensive, and may well disappear.

The Pools believe that the continued ability of private insurers to main orderly markets for nuclear liability and property insurance at high levels depends on an absolute cap on the limit of liability of all persons who may be responsible for a nuclear incident. They also believe that the absence of a cap, coupled with the disruption of the insurance industry's ability to make a maximum contribution to the nuclear risk through the Pools, will increase the pressure to outlaw the current nuclear exclusions in liability and property insurance policies. This would lead to the withdrawal of private insurers from writing conventional coverages in the vicinity of nuclear power plants. Some government sponsored or dictated response would be required, with all the attendant problems that the Price-Anderson system has avoided for the last 29 years.

4.

Given the unwillingness of the insurance industry to increase the amount of private insurance since 1957, why shoudn't we eliminate the requirement of primary insurance and simply adopt a retrospective premium system whereby the utilities themselves provide financial protection in the case of an accident?

A.

The question is based on a mistaken premise. There has never been an unwillingness on the part of the insurance industry to increase the amount of private nuclear insurance. The insurance industry has in fact increased the amount from $120 million in 1957 to $775 million today. This substantial increase has been achieved despite the fact that the financial and regulatory burdens imposed on the nuclear industry in recent years have virtually brought the growth of nuclear power to a standstill.

This question, nevertheless, appears to be mainly philosophical. One could just as well ask: Why don't we simply have the government insure all industrial risks through a series of compulsory industry associations or tax supported funds? There is no justification for singling out the nuclear industry. Certainly the performance of the private insurance markets in maintaining a stable, high capacity market for nuclear liability and property insurance without shortages or sharply escalating premium costs has been exemplary. The insurance industry's severest critics concede that its performance at Three Mile Island was highly professional.

In our view, as long as there is a private nuclear power program, and as long as the participants in that program prefer to buy private insurance against a substantial part of the risk, they should be permitted to do so. If the nuclear utilities prefer to absorb the entire risk themselves, they have demonstrated that they are quite capable of developing self-insurance mechanisms through privately organized mutuals, without the need for government intervention.

5.(a)

Is there any difference in principle between a risk-spreading system that calls for premiums in advance and one that calls for premiums after an accident, if it is the same persons that pay the premiums and thus bear the risk under either system?

A.

There is clearly a sharp difference in principle between the two systems even if there is a perfect identity of persons who will pay. The circumstances under which payments will be required are likely to be substantially different. Following a major nuclear accident, there could be widespread financial and economic disruption, making it more difficult and more costly to make the payments.

We believe that a sound funding plan for the nuclear risk calls for partial pre-funding and partial retrospective funding. The old-fashioned principle of putting something away for a rainy day is still sound.

(b)

What does it matter if the amount of primary insurance is decreased by the insurance pools if the decrease will be compensated for by a corresponding increase in the amount of secondary insurance available through the retrospective premium system, considering that it is the nuclear utilities that pay the cost of the premiums for both the primary and secondary levels of protection?

A.

A small decrease now and then, if necessary to take into account a temporary decline in the amount of private insurance available would not be critical. As noted above, however, sound funding for a nuclear catastrophe calls for pre-funding a substantial portion of the costs of a potential nuclear accident. Private insurers, through the Pools, provide an excellent source of these funds from outside the nuclear industry and the claims organization needed to move in quickly to process and pay claims. A retrospective plan could not be put into place and funded overnight. The higher the potential retrospective liabilities of the nuclear industry for third party liability and property damage claims, the more desirable reasonable increases in the primary financial provided by outside funds become.

(c)

Suppose that there were no primary financial protection available from the insurance pools, and that the sole means of providing financial protection was through [the] retrospective premium system. Would such a system cost less for the nuclear utilities, since they wouldn't have to pay for the profits of the insurance pools?

A.

It might cost substantially more or slightly less, depending on the timing of a loss, how disruptive it turns out to be, and whether there is a second loss in short succession. It would undoubtedly cost more to get a claims handling plan underway. The Pools offer the advantage of having a plan in place that can respond within a few hours, as demonstrated at Three Mile Island.

Just as the Pools could not generate electric power very efficiently, one might expect that the electric power industry might not be able to manage a disaster claims operation as well as the Pools or as conveniently. The Pools are risk-takers in the primary layer, particularly with respect to a second incident, as the reserve fund is likely to be exhausted by a major accident. The utilities would have tc respond without the benefit of the buffer the Pools provide.

Perhaps the best guage of the relative costs and risk of the two systems is that presently all utilities buy the full amount of their primary financial protection from the Pools, although they are free to meet the statutory requirements, in whole or in part, by other means.

6.

Approximately how much in profits have the pools made through providing for nuclear utilities the primary financial protection required by Price-Anderson?

A.

The Pools are preparing an exhibit which will show their combined operating experience since 1957. When writing catastrophe insurance at high limits for extremely rare events, it is somewhat unreliable to consider the surplus of income over outgo for any period of time as "hard" profits, because the status can change overnight. Three Mile Island turned 22 years of black ink on the property side of the Pools' operations into red just about that quickly. Much of their operating surplus at any given time must be regarded as in the nature of a contingency fund for this risk.

7.(a)

How would the exclusion of punitive damages from Price-Anderson coverage affect the amount and cost of insurance available for other types of damages?

A.

The exclusion of punitive damages would probably not have a direct effect on the rates for nuclear liability insurance. It might help the Pools attract more capacity. The reason that the effect would be somewhat limited is that, at the primary level, a moderately large accident would probably exhaust the primary layer through emergency assistance payments and compensatory settlements.

(b)

If punitive damages were excluded from Price-Anderson coverage (such as proposed in S.1761), would the insurance pools nevertheless provide coverage for punitive damages?

A.

As long as it would not be contrary to public policy to do so, or would not make the Pools' coverage unacceptable as financial protection, the Pools would endeavor to continue to provide the same coverage they provide today.

(c)

If the answer to (b) is yes, would this coverage for punitive damages displace funds available to compensate victims of the activity giving rise to the punitive damages?

A.

Yes; it would have such an effect. Punitive damages generally, but especially in a catastrophe situation, constitute a windfall to a few at the expense of many other injured persons. In the Price-Anderson context, punitive damages also undercut the Nuclear Regulatory Commission's authority and responsibility with regard to safety regulation.

The Pools strongly support the banning of any recovery for punitive damages for those nuclear accidents for which financial protection is required under Price-Anderson.

Richard A. Schmalz
212 Pattonwood Drive
Southington, CT 06489
(203) 747-5332

June 24, 1986

Alan K. Simpson
Chairman
Subcommittee on Nuclear Regulation
United States Senate
Committee on Environment and Public Works
Washington, DC 20510

Dear Senator Simpson:

Thank you for your letter of May 21, 1986.

I am pleased to submit the enclosed responses to the additional questions that you and members of the Subcommittee have raised. I hope that they will be of assistance in your consideration of the several bills dealing with Price-Anderson renewal.

As always, the Pools appreciate the opportunity to testify before your Committee.

Very truly yours,

Richard A. Schmalz

Richard A. Schmalz
Counsel
American Nuclear Insurers and
  Mutual Atomic Energy Liability Underwriters

Enclosures

REAUTHORIZATION OF THE PRICE-ANDERSON ACT
Hearing of May 13, 1986

Answers of Richard A. Schmalz to Additional Questions

Questions from Senator Simpson

1. Why is it that the insurance business, generally, and nuclear insurers in particular, are willing to provide greater amounts of property insurance than liability insurance?

   Allowing for the inherent preferences of underwriters (many specialize in property insurance and many others in liability insurance), the more fundamental reason is probably that writing high limits of property insurance is considered to be substantially less risky than writing high limits of liability coverage under the United States tort system.

   The risk in underwriting nuclear liability insurance involves the coincidence of two elements that are marked with great uncertainty. When or how often a large-scale nuclear incident will happen is vitually unpredictable. If such an event should take place, the extent of the damages can vary widely by chance. And the dollar consequences would then be determined by an uncertain standard (tort law).

   On the other hand, on-site property damage claims may arise out of smaller scale accidents. The dollar consequences for the property damage underwriter are governed mainly by the value of the property insured. The timing, frequency and severity of these lesser events appear to be influenced by engineering design and maintenance. Thus, although property damage accidents are expected to be more frequent than accidents with large off-site consequences, their cost is far less uncertain.

2. What impact, if any, does the aggregate limit on liability in Price-Anderson have on the amount of liability insurance that private insurers are willing to provide? Would the amount of liability insurance go up if the limit were eliminated? If so, would the increase be significant enough to warrant removal of the limit on that basis?

   If the aggregate limit appears to underwriters to be unreasonably high, the financial burden on the utility industry, in the event of a catastrophic loss, could be so heavy as to have an adverse effect on safety. Such a possibility would correspondingly have an adverse effect on the amount of liability insurance underwriters would be willing to provide. Removal of the limit entirely enhances this possibility, and since the current floating limit of liability absorbs all the liability inurance available, it follows that removal of the limit would not increase private liability insurance.

3. In your testimony, you note that "the principle of an absolute limitation on liability on liability coupled with channeling must be retained. If not, there will be little if any nuclear liability insurance". Please explain what you mean by that statement and, specifically, explain what the connection is between channeling and the amount of liability insurance that can be offered?

The explanation lies in the fact that channeling is a means of avoiding unpredictable cumulations of risk for those underwriters world-wide who write nuclear insurance. To show how the principle works and its advantages we will give a hypothetical illustration that is, however, substantively correct.

Assume:

a) The world insurance market for nuclear insurance is made-up of 160 underwriters, each of whom is willing to risk $1 million for a single nuclear incident in the United States. The total capacity of the world market is thus $160 million.

b) There are 100 nuclear power plants in the United States that each want $160 million of primary insurance. They also provide a second layer of coverage equal to $X million through a retrospective premium plan.

c) There are 1000 suppliers of goods and services to the nuclear industry. On average there are 99 suppliers at each plant, but the identity of the suppliers at each plant varies widely. Each of these suppliers wants insurance in varying amounts ranging from $10 million to $160 million.

Objective:

To make $160 million of private insurance available to the nuclear industry at the lowest possible cost, while assuring full financial protection to the public.

Step:

1) Organize the insurance market through pools. Since no one source can supply the demand, a structured market with stable reinsurance arrangements is highly desirable, if not required.

2) The market could make $160 million available to each power plant without difficulty if it did not have to face the competing demand from suppliers. There is no practical way, however, of dividing the $160 million among each plant operator and its suppliers through individual policies. Not only would the amounts of each policy be lower than many potential policyholders would desire, but the coverage pattern at each plant might total less or more than $160 million. Underwriters could not accept the latter possibility, and would have to trim coverage somehow. The policyholders and the public would have less protection than the ideal under the first possibility.

3) The problem of cumulation disappears if all of the liability of the suppliers is channeled to the plant operators. In the United

States this is done indirectly by having the plant operator's insurance policy cover all the suppliers. A new problem is introduced, however. The plant operators have no incentive to accept this added responsibility without something in return. The answer is to cap the industry's liability at a reasonable amount (the sum of the primary and secondary layers of private financial protection). Without a cap on the liability of suppliers at that point, a competing demand for insurance would arise. The market could not fill this demand without reducing the primary capacity to plant operators and risking cumulation.

4) The final step to complete the financial protection to the public is to provide supplemental government financial relief if the cap is reached before all just claims are compensated.

From this illustration it is clear that if you wish to maximize private insurance capacity by channeling liability to plant operators indirectly through the omnibus insurance clause, then an absolute limitation on liability is needed .

4. In his testimony, John Harkins briefly described the manner in which insurance companies handled claims arising from the Three Mile Island Accident -- including payment of evacuation expenses in the days immediately following the accident. Please expand on how these claims were handled and, specifically, comment on whether the willingness of the insurers to pay expenses so promptly was a function of the procedures of Price-Anderson, or is simply a routine matter for insurance companies, generally, in both nuclear and non-nuclear cases?

The Pools first received notice of the Three Mile Island accident about 7:30 a.m. on March 28, 1979. On March 29 they had representatives in Harrisburg. They set up an emergency claims office in the morning of March 30. Shortly after noon on March 30 Governor Thornburgh announced his evacuation advisory. The Pools' claim office was opened at 9:00 the next morning to provide financial assistance to those families that desired to move to a hotel or motel. The evacuation order was rescinded on April 9, but the claims office remained open through July 29, 1979.

In all, evacuation expenses totaling $1,217,266.06 were paid to members of 3,170 households. Lost wages of $82,400.43 were paid to 636 individuals.

The payment of evacuation expenses immediately following a catastrophe is principally a function of Price-Anderson procedures. Not only does the insurance policy provide for such payments, but evacuation is recognized as a real possibility in connection with a nuclear accident. The Pools have had a detailed claims plan in effect since shortly after their inception and, since 1975 have conducted annual emergency drills to test their response procedures. I am not aware of any response mechanisms for non-nuclear cases that are as comprehensive or as well developed as that fostered by Price-Anderson.

5. In your testimony, you stated that saddling the nuclear industry with excessively heavy financial burdens will not make nuclear plants safer or provide the public with more financial protection. Please explain what you mean, and why you appear to take a fundamentally different approach from Mr. Hunter on the safety issue?

On the safety issue, the argument that imposing financial liability increases safety has a popular intuitive appeal. It has not been rigorously demonstrated, however, that this is the case, particlarly at very high levels. It has been observed with other forms of stimulus that increased "doses" have a lesser effect. And there is a definite risk that an overdose will kill the patient.

There are indications that before business enterprises suffer "crushing liabilities", maintenance, and hence safety, are short changed. And if ultimately bankruptcy occurs, then unlimited liability suddenly becomes very limited indeed. Insurers believe that neither of these developments is in the public interest.

6. What impact, if any, would an unlimited right of subrogation have on -- (A) the amount and distribution of liability insurance; (B) the willingness of the insurer to settle claims; and (C) "insurance coverage" litigation?

An unlimited right of subrogation would undercut the channeling concept. As this is the key to maximum capacity, the effect would be to reduce the total amount of liability insurance available. The maximum amount available to each participant would also be reduced.

Drawing from the earlier hypothethetical example, assume the maximum liability capacity for a single nuclear incident is $ 160 million. Assume that there are 100 nuclear power plants and that on average 99 suppliers are potentially at risk in the planning, design, construction, maintenance and operation of each. Then the average maximum limit would be $16 million for each potential defendant at each plant.

In actual practice, however, the average amount available would undoubtedly be far less, because there are more than 99 suppliers potentially at risk for the nuclear industry as a whole. (Each of the 100 reactors is not served by the same 99 suppliers). The complications arising from trying to match the potentially liable suppliers to each power plant would probably result in underwriters being unwilling to risk even the $16 million average for any one insured.

There is little doubt that under such fragmented insurance arrangements there would be a disincentive to settle claims promptly and a powerful incentive to bring cross actions for indemnity. Although "insurance coverage litigation" is generally separate from liability issues, and depends on contract disputes, there would probably be more demands for separate, individualized defenses simply because more potential insureds would be involved . This would lead to higher defense costs generally and would tend to spawn more coverage litigation.

7. You alluded in your testimony to the situation that is confronting liability insurers in other areas. To what extent, if any, have the problems in these other areas -- including the crisis in the availability of liability insurance -- arisen in the nuclear liability insurance field? To the extent that nuclear liability insurance has been a relatively steady and predictable market, what, in your view, is this attributable to?

   There has been no crisis with respect to the availability or cost of nuclear liability insurance. Very large limits, relative to those for ordinary commercial lines, have been readily obtainable since 1957 through the Pools. This is attributable to the fact that the Price-Anderson system channels all liability to the nuclear power plant licensees and caps that liability at a reasonable amount.

8. Please summarize what type of insurance, other than liability insurance for commercial nuclear power plants over 100 megawatts, is available. In what amounts? Is the coverage under these policies omnibus? How do you assess the risk in these aother areas? How are premiums determined? Please summarize the claims experience in each area.

   The Nuclear Pools also make nuclear energy liability insurance available to operators of nuclear installations other than nuclear power plants, such a fuel fabricators and educational or research facilities. The terms of the coverage are much the same as for the power plants. It includes the omnibus feature. The maximum amount of coverage is also the same ($160 million).

   A different form of coverage is available for suppliers and transporters. It does not include omnibus coverage. The maximum limit is $160 million. Coverage is meshed with any omnibus coverage under a Facility policy so that the maximum limit of $160 million is not exceeded for any one incident.

   Risk is assessed by the Pools' underwriters with the advice of their engineers, considering the type of facility or operation and the quantities of nuclear material involved. In general, the risk is considered much less than that of power reactors, especially with respect to the catastrophe hazard. Premiums are determined by judgment and are much lower than for the large power reactors.

   Taken a group, the large power reactors have produced 71 claims*, resulting in paid losses of approximately $50 million with reserves of approximatel $103 million. All other risks have produced 46 claims, with payments pf approximately $1.6 million and reserves of approximately $13 million.

   * Note that in some instances a "claim" involves more than one individual.

Question from Senator Stafford

The question relates to whether unlimited liability necessarily destroys channeling, which the Pools believe is essential to the ability of the insurance industry to provide any significant liability insurance capacity for nuclear risks, including contractors and suppliers. Senator Stafford points out that S.1761, absent Amendment #770, preserves channeling by adding a new sentence to section 170e., providing in effect that the retrospective premiums provided by the utilities shall be the exclusive source of payments for public liability claims.

We regret that we may have contributed to possible confusion on this particular point. Channeling is not incompatible with unlimited liability. In the absence of a specific statutory provision providing for channeling, as is common in the European systems, however, reliance cannot be placed solely on omnibus insurance and indemnity coverage as has been the case up to the present in the United States. I believe that although Senator Stafford's statutory approach is indirect, it should accomplish the channeling result he intends. Amendment #770, by introducing subrogation, would undercut the channeling concept.

Senator Mitchell's Questions

1) Would the Pools assign higher premiums to a utility that declined to follow such [i.e., the Pools' engineering] recommendations by citing NRC regulatory requirements? The answer is in essence that the Pools' would consider both NRC regulatory requirements and any additional recommendations that their own engineers deem to be appropriate for an individual case. Failure to comply could result in higher premiums.

2) This question relates to Baltimore Gas & Electric Company's request to reduce its emergency planning requirements based on recent source term research. The Pools do not have enough information on this specific case to express an opinion as to whether research is sufficient to warrant a reduction. However, it is good to learn that, based on the recent source term research, the nuclear hazard appears to be less than many have previously thought.

3) The nuclear insurance industry would not support a cap, such as a percentage, for claims handling costs because it will reduce the effectiveness of the Pools' capacity. For example, if the cap were set at 25% of the amount of the policy limit (currently $160 million maximum), $40 million would have to be reserved for defense and only $120 million would be left for payments to injured third parties. If, as I believe likely, the claims handling costs turn out to be substantially less, then the public would sustain a net loss in financial protection, as compared with the present system. On the other hand, if the costs are more than 25%, a question would arise as to who would pay for the claims handling costs prior to the exhaustion of the Pools' indemnity limit. The only source of funds would be the retrospective layer, ultimately diminishing the

total available. From an insurance standpoint, the total funds available for both indemnity and the necessary claims costs cannot be made greater by splitting the funds into two pots with separate caps.

4) ANI and MAELU have not taken a formal position on whether they would oppose an exclusion of liability claims from gross negligence or willful misconduct. They are not proposing any such exclusion, and have grave doubts that such an exclusion could be drawn without damaging the carefully worked out balance between the coverage afforded by the Pools and that provided by conventional liability policies.

Gross negligence and willful misconduct have unfortunately become very slippery concepts under our tort law, especially when combined with the concept of vicarious liability. Insurance practice generally does not make any specific distinction between ordinary negligence and gross negligence or willful misconduct as such. The general rule is to focus on the question whether the injury or damage was expected or intended from the standpoint of each individual insured. No specific additional charge is made for gross negligence or willful misconduct, but no coverage is given for expected or intended injury.

The wide omnibus coverage of the Pools' policies is also a factor. Even if one were to exclude coverage for one or two potential defendants on the grounds of gross negligence, some other covered defendants could undoubtedly be found who might be strictly liable or only ordinarily negligent. The whole thrust of Price-Anderson has been to make the coverage available for the protection of the public as efficiently as possible, without reducing the limited funds available by excess frictional costs. For example, absent an act of war, a saboteur could be an insured under a Pool policy.

Since it now become almost universal practice to include counts for gross negligence and willful misconduct in major law suits, an exclusion drawn along these lines would make it virtually impossible to provide a consolidated defense, as was the case at Three Mile Island. This would of course greatly increase defense costs, because as a general rule, the duty to defend cases in these circumstances is greater than the duty to indemnify. Conflict of interest rules would probably require separate counsel.

In summary, we do not see any advantages to the public from placing such exclusions on the Price-Anderson coverage.

* * * * * * * * *

AMERICAN
NUCLEAR
INSURERS

BURT C. PROOM, CPCU
President and Chief Executive Officer

JOSEPH MARRONE
Senior Vice President
and General Counsel

April 3, 1986

Hon. Robert T. Stafford, Chairman
United States Senate
Committee on Environment & Public Works
Washington, DC 20510

Dear Senator Stafford:

POOLS' OPERATING SURPLUS

This letter supplements Mr. Schmalz's letter to you of March 24th.

I have enclosed a one-page description of the total operating surplus of insurers and reinsurers (including foreign reinsurers) that have participated in ANI and MAELU (Pools).

The operating surplus has been accumulated over the 29 years in which insurers participating in the Pools have provided nuclear liability insurance not just for all private power reactors, but also for fuel fabricators, reprocessors, waste disposal and burial, R&D facilities, and miscellaneous other activities of the private nuclear industry.

It is important to recognize that the cost of the nuclear liability insurance provided the last 29 years is not yet determined. Late emerging claims by workers (who choose to sue in tort), or the public, for alleged injuries from radiation exposure or claims for alleged environmental damage during the 29 years the Pools have provided insurance might be asserted any time in the future. Further, changes made in the Price-Anderson Law, or in tort law generally, could expand liability which would operate to create new liability for our insureds (and thus for the Pools) with retroactive effect.

Very truly yours,

JMarrone

Joseph Marrone
Sr. Vice President
& General Counsel

JM/jr
Enclosure
c/c - R. Schmalz-w/att.

The Exchange Suite 245 / 270 Farmington Avenue / Farmington, Connecticut 06032 / (203) 677-7305 ■ Eng. Dept. (203) 677-7715 / TLX No. 643-029

AMERICAN NUCLEAR INSURERS/MAERP REINSURANCE ASSOCIATION
DOMESTIC PRIMARY LIABILITY POOL
29 YEARS'S RESULTS - 1957 to 1985

Gross Written Premium	$336,755,372
Less:	
Refunds	33,889,899
Incurred Losses	141,819,928
Operating Expenses*	43,778,198
Balance in Reserve Fund After Deduction of Incurred Losses	73,823,776
Underwriting Surplus	43,443,571
Investment Income	118,400,000
Operating Surplus from 29 years operations	$161,843,571

---

* Calculated at 13% of Gross Written Premiums

NATIONAL INSURANCE
CONSUMER ORGANIZATION

TESTIMONY OF

J. ROBERT HUNTER
PRESIDENT
NATIONAL INSURANCE CONSUMER ORGANIZATION

BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON NUCLEAR REGULATION

UNITED STATES SENATE

MAY 13, 1986

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify today and thank you for inviting me.

BACKGROUND ON ATTEMPTS TO REMOVE THE NUCLEAR EXCLUSION FROM HOMEOWNER'S POLICIES

I first raised the possibility of removing the nuclear exclusion for claims in excess of the Price-Anderson Act limits from property insurance policies at the December, 1975 meeting of the National Association of Insurance Commissioners (NAIC) in Puerto Rico, when I raised the question on behalf of the Federal Insurance Administration (FIA).

What prompted the FIA to initiate this line of questioning was, quite simply, the fact that an accident in excess of the Act's limit was possible and the nuclear exclusion raised the real possibility that injured persons would have to pay for the negligence of others or the taxpayers would have to shoulder the burden. Either possibility is unacceptable.

I specifically asked the question, "how much would it cost to insure this gap in coverage?" Insurers formed an Advisory Committee but, stated bluntly, never came close to answering the question, even after the Three Mile Island event prompted the NAIC to demand the estimate. The lack of response was unfortunate, I believe, because the answer would assist public policymakers in determining the hidden subsity America's citizens pay to nuclear power. If the subsidy is small, then a decision to require insurers to offer the coverage might be viable; if the cost is dear, then Congress should consider alternatives to the liability limit Price-Anderson Act.

The closest I was able to come to an answer to the hidden subsidy amount was the offer made by CIGNA Insurance Company to the Governor of Pennsylvania in which CIGNA agreed to eliminate the exclusion from that state's homeowner's policies for a $25 cost per home but only if the state would require that all homeowners pay this amount. At that time, there were 57,029,000 single family detatched housing units (1983 Bureau of Census data), so that implied a $1.4 billion per year subsidy from homeowners of America to nuclear power just for the homeowner contribution, not including business properties, health and life risks.

A frustrated NAIC, after a third Advisory Committee attempt, testified last year before the House that "At this time, the $160 million of liability coverage provided by the private insurance industry appears to be all that the private insurance industry is able and willing to provide. That $160 million is insignificant in terms of the liability that would arise if an END did occur. Because this represents such an insignificant proportion the NAIC recommends the first tier of liability coverage provided by the private insurance industry be eliminated . . . The NAIC believes the insurance industry would probably better serve the public by concentrating its efforts on the property side of insurance for nuclear power plants . . . The insurance industry now provides about $1 billion worth of property insurance for nuclear power plants. This is the kind of risk the insurance industry can best handle."

The NAIC went on to recommend that claims processing services for large losses could be provided by the industry, as it does for the National Flood Insurance Program, and that non-ENO incidents might continue to be privately insured.

The NAIC also concluded, based on ten yea's of study, that the nuclear exclusion should be retained to protect solvency of private insurers but that Congress should move to "make parties who are damaged by a nuclear incident whole (so) there is no need for nuclear coverage in personal lines insurance."

NICO'S POSITION

We continue to believe that insurers have capacity to write more nuclear coverage but, it is painfully clear, they lack any desire to do so. Further, there is a general "crisis" in liability insurance caused by the economic cycle of the insurance industry exacerbated by the sharp decline in interest rates, indicating a more general failure of will by insurers.

NICO is supporting expansion of the Product Liability Risk Retention Act to enable businesses to group together to self-insure and get out from under the vagaries of the insurance industry; to avoid the manic-depressive nature of the cycle where, a few years ago, insurers lusted after liability insurance at almost any price to gain cash flow but where, today, even low risk nurse-midwives and day care centers cannot find insurance.

To their credit, as respects nuclear insurance, the insurers have been consistantly saying "No" to federal and state policymakers. They simply don't want to write nuclear liability insurance or to allow individuals to insure themselves by removal of the nuclear exclusion. This clarity of refusal by insurers, during good as well as bad economic times, compares favorably with their now-we-want-it, now-we-don't approach to the other liability lines.

The $160 million limit currently provided by the insurers is a pittance, and is costly (we estimate that the current cost is $50 million per year). Further, the limit is illusory since the costs incurred in investigating and defending claims are paid out of the "public" compensation fund. The more they delay and fight claims, the less the public gets -- this is a perverse incentive approach that insurers have recently backed off of for other liability coverages because the public outcry was intense when insurers recently suggested it.

Thus, NICO has altered our position on this matter and now propose full elimination of insurer participation from covering any nuclear liability coverages. Claims could be processed as in the Flood Insurance Program. The $160 million limit could be funded by additional assessments of the utilities which will be far cheaper than the current convoluted insurance approach.

Pools offer much more incentive for risk management than the current approach. Subrogation to guilty parties should be allowed so that safety incentives run to all parties involved. There is no principled justification for excusing wrongdoing in this industry any more than in any other; indeed, there may be less justification given the deadly nature of the risk involved here.

THE BILLS

You asked that we comment on three bills:

The Hart Bill -- S445

This bill retains the current post-accident pooling requirements (which would provide roughly $640 million), but removes the absolute cap on liability. Under this plan utilities would need to insure themselves to whatever level they felt was prudent; if damages exceed the amount of compensation, members of the public can sue whomever is responsible for uncompensated damages. (This bill does not address any DOE-contractor or nuclear waste issues.)

NICO believes this bill would be helpful but that the approach embodied in S1761 is superior in that the public will be more completely protected should a large accident occur.

The Stafford Approach -- S1761

This bill is based on the NRC's 1983 Price-Anderson recommendations to Congress. This bill substitutes an annual limit on liability for the current absolute limit. Essentially an industry self-insurance program, this bill requires an annual $10 million per plant assessment from nuclear plant owners for as many years as necessary to compensate all public damages. S1761 also removes the limit on liability for accidents involving high-level nuclear waste, requiring compensation to be paid out of the generator-financed Nuclear Waste Fund. The companion amendment to this bill (Amendment 770) allows any party that pays into the compensation fund to recover compensation costs from anyone who is found liable under state tort law.

This bill is prefered by NICO in that it places nuclear power in a level playing field with the rest of the American economy *vis-a-vis* any injuries sustained by citizens. It allows utilities to sue any party who causes an accident, under state tort law, which enhances the safety incentives. It guarantees payment of all damages to injured parties with no taxpayer involvement while assuring that utilities know their maximum contribution by year.

The Simpson-McClure Bill -- S1225

This bill increases the liability limit to between $1.6 and $2.4 billion. Under this bill industry assessments are increased to $15 million per plant (after an accident) and an additional $500 million could be collected through a tax on nuclear electricity. The liability limit for federal nuclear activities is increased to correspond to the limit for commercial nuclear accidents. compensation for damages involving high-level nuclear wast is paid out of the Nuclear Waste Fund. If damages exceed the limit, Congress is required to consider legislation for providing additional compensation under expedited procedures.

This bill is an improvement over the current situation but still leaves the potential for taxpayers or victims paying for the misdeeds of utilities or their contractors, something NICO believes is not appropriate.

NICO believes that private insurer involvement in liability insurance should be eliminated as part of any amendment to the Price-Anderson Act.

QUESTIONS

I attach a list of eleven questions you sent to me and my responses to them.

Attachment

QUESTIONS FOR J. ROBERT HUNTER:

1. To what extent, if any, does the channeling of liability feature of the Price-Anderson Act (also referred to as "omnibus coverage")—
   - (a) contribute to maximizing or minimizing the liability insurance available for commercial nuclear accidents?
   - (b) contribute to more or less efficient allocation of liability insurance capacity?
   - (c) contribute to more or less efficient settlement, adjudication, and payment of public liability claims by insurance companies following a nuclear accident?

2. What effect, if any, would modification or elimination of the channeling feature have on—
   - (a) the amount of liability insurance available for commercial nuclear accidents?
   - (b) the cost of liability insurance?
   - (c) the allocation of liability insurance?
   - (d) settlement, adjudication, and payment of public liability claims by insurance companies following a nuclear accident?

In addition to any general comments, please comment specifically on the impact of Amendment No. 770 to S.1761 (copy attached) in each of these four areas. To what extent, if any, would the approach taken by the insurance companies in settling, adjudicating, and paying claims following the Three Mile Island accident have been any different under an approach such as that proposed in Amendment No. 770?

3. What effect, if any, does the aggregate limit on liability have on the amount of liability insurance provided by insurance companies? Would a significant increase in, or elimination of, the limit result in an increase in the amount of liability insurance available?

4. What steps, if any, can or should be taken, either administratively or legislatively, to encourage or require insurance companies to provide greater amounts of liability insurance for commercial nuclear accidents?

5. Please comment on the need for, advisability of, and consequences of a legislative requirement that insurance companies provide a given amount of liability insurance.

6. What impact, if any, would extension of the provisions of the "Product Liability Risk Retention Act of 1981" (Public Law 97-45) to nuclear liability insurance have on the availability and cost of such insurance?

7. What impact, if any, would exclusion of the costs of investigation, settlement, and defense of claims from the amount of financial protection available under the Price-Anderson Act have on—
   - (a) the amount of liability insurance available for commercial nuclear accidents?
   - (b) the cost of liability insurance?
   - (c) the allocation of liability insurance?
   - (d) the settlement, adjudication, and payment of public liability claims following a nuclear accident?

8. What impact, if any, would a prohibition on the payment of punitive damages out of the financial protection available under the Price-Anderson Act, along the lines of the approach taken in S.1761, have on--

- (a) the amount of liability insurance available for commercial nuclear accidents?
- (b) the cost of liability insurance?
- (c) the allocation of liability insurance?
- (d) the settlement, adjudication, and payment of public liability claims following a nuclear accident?

9. Please comment on the availability, cost, allocation, and amount of nuclear liability insurance currently provided by insurance companies, the actuarial basis for making such determinations, the nature of the risk involved, and the extent to which nuclear liability insurance compares favorably or unfavorably with insurance, including nuclear property insurance, in other areas?

10. Please comment on the three legislative proposals currently pending before the Subcommittee (copies and explanations attached). Specifically, please comment on the impact, if any, that each of these proposals will have on--

- (a) the amount of liability insurance available for commercial nuclear accidents;
- (b) the cost of liability insurance;
- (c) the allocation of liability insurance; and
- (d) the settlement, adjudication, and payment of public liability claims following a nuclear accident.

11. Please comment on whether, generally, the Price-Anderson Act has had the effect of increasing the amount of liability insurance that would otherwise be available in the absence of Price-Anderson to pay public liability claims resulting from commercial nuclear accidents ? Alternatively, has the Act inhibited the availability of liability insurance to pay such claims? Please explain.

RESPONSES TO SPECIFIC QUESTIONS

1. (a) Channeling does not, in my estimation, increase private liability insurance coverage. The proof is that the current $160 million of coverage is a mere 0.2 percent of the $77 billion surplus of this industry which is itself a small fraction of the capacity of this industry. The $50 million premiums are only 0.04 percent of the $142 billion premiums written in the nation last year.

(b) Channeling has failed to allocate it, efficiently or inefficiently.

(c) This goal can be emhanced by channeling but can be equally advanced by a contractual agreement such as the National Flood Insurance Program uses.

2. (a) None
   (b) None
   (c) None
   (d) None, if proper arrangements are made.

If 770 is in place, the answer is roughly the same, because under current law suppliers can be held liable if sued by the utilities for what the utility itself loses which could run to billions of dollars.

3. There is little incentive for the utility, or for insurers, to be innovative in trying to expand coverage today due to the low liability limit. Raising or eliminating the limit would likely increase liability insurance, but only moderately.

4. Insurers should be excused from all nuclear liability coverage, NICO believes.

6. None, the utilities already have formed pools of the type the Risk Retention Act would allow.

7. (a) and (b) It would likely reduce the amount available or increase costs.
   (c) None
   (d) None

8. It is not likely that a restriction on punitive damages would have any impact on nuclear liability insurance; punitive damages are available in some states, misbehavior in the nuclear context should certainly be punishable at least to the level of misbehavior in less risky contexts. As I read it, under S1761, punitive damages wouldn't be paid out of the victims' compensation fund anyway; that's good. Punitive damages should not be insurable as a matter of sound public policy in any event.

9. I'd love to be able to answer this question, it is the kind of information I have sought for eleven years to no avail. We have been able to determine that the rates are established by an unregulated cartel and that the utilities don't offer much resistance since the costs are routinely passed through to ratepayers with no challenge. We know that insurers can write more than this, *viz:*

(1) ten underwriters wrote $200 million on the Union Carbide Bhopal, India disaster;

(2) a $5.5 billion exposure in Los Angeles should an earthquake the size of the 1906 San Fransisco event occur; and

(3) the high level of nuclear power property insurance they write.

Earthquake is a wonderful example of insurers making high dollar coverage available. Although experts estimate the risk of a giant quake at one in two by the year 2000, the insurers have written the coverage freely. Insurers have 34 times the nuclear exposure from earthquake in just Los Angeles.

10. See the body of my testimony for comments on the bills.

11. I believe the Act has inhibited the availability of liability insurance since there is little incentive for the utilities or the insurers to innovate. If utilities insisted on more coverage, as they would if the Act were not in place, they would get more. However, how much more is an important question. I think that insurers could "bet" up to $2 or $3 billion on this, but not at cycle bottom times like this. In fact, the danger would be that the capacity could swing from, say, $3 billion to near nothing (say, $160 million) if left to the insurer's cyclical responses. That is one reason I have decided to opt for elimination of insurer from this coverage.

Department of Energy
Washington, D.C. 20585

June 10, 1986

Honorable Alan K. Simpson
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In a previous reply to your question concerning Department of Energy (DOE) contractors operating in areas which might lead to a nuclear incident occurring outside of the United States, we noted that a survey of such activities would be completed in May 1986 and the results submitted to the Subcommittee. This survey has now been completed.

There are eight agreements that involve DOE-owned nuclear material in foreign countries. Each agreement is covered by the Department's indemnification authority under Subsection 170.d. of the Atomic Energy Act of 1954, as amended.

The nuclear material includes irradiated fuel rods (two agreements with Canada), non-irradiated fuel pins (United Kingdom), high temperature gas reactor spent fuel (Federal Republic of Germany), and the isotope Californium-252 (three agreements with Japan). These U.S.-owned nuclear materials are utilized in research and development activities, including fuel damage assessment, source term development in support of an on-going Nuclear Regulatory Commission program, and medical research. The work with the Federal Republic of Germany involving high temperature gas reactor spent fuel was completed as of December 31, 1985, and the fuel will be shipped back to the United States in late 1986.

DOE also maintains a program to accept foreign spent research reactor fuel as part of our Nation's nuclear nonproliferation policy. One contract involves spent research reactor fuel not yet owned by DOE. Under that contract, DOE will take title at the port of embarkation of the Far East country from which the spent nuclear fuel will be shipped to the United States. Subsection 170.d. will apply under this contract from the point at which DOE takes title to the spent fuel.

We do not envision any significant change in either the types or quantities of U.S.-owned nuclear material used in foreign countries. The Department considers it unnecessary to modify Subsection 170.d. of the Atomic Energy Act to provide any change in Price-Anderson coverage for nuclear incidents involving U.S.-owned material occurring outside of the United States.

We will be pleased to furnish any further information that you may desire.

Sincerely,

James W Vaughan, Jr

James W. Vaughan, Jr.
Acting Assistant Secretary
for Nuclear Energy

cc:
Honorable Gary Hart
Ranking Minority Member
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Testimony of Mary Guth Haselton,

on behalf of the

New Jersey Department of Energy

before the

Subcommittee on Nuclear Regulations

of the

Environment and Public Works Committee

of the

U.S. Senate

Price Anderson Act

May 13, 1986

New Jersey has some of the highest electricity costs in the country. These high costs impact every segment of the economy in this state. New Jersey industries are being lured to other states where the electricity costs are lower. Movement of new business to New Jersey is being influenced by electricity costs. In particular, the residential sector is impacted by the high costs of electricity, which contribute to the overall high cost of living here. It is the policy of the New Jersey Department of Energy, as stated in its Energy Master Plan of 1985, to encourage the lowest possible energy bills for all consumers. This is necessary in order to promote economic growth in New Jersey as well as lower the cost of living for all residents.

The average price of a kilowatt-hour in this state has increased 475 percent since 1970. The state was hit hard by the oil crises of the seventies, particularly in the area of electricity generation. In 1972, 60 percent of the electricity consumed in New Jersey was generated by oil. The utilities in the state have moved to lessen our dependence on oil in the years since. Oil is now used to generated less than 6 percent of the electricity consumed in the state. Much of this reduction has been made possible by the increasing reliance in New Jersey on nuclear-generated electricity. Nuclear power now accounts for 26 percent of the electricity consumed in New Jersey. A new nuclear power plant will be coming on line this year which could increase our dependence to about 35 percent.

New Jersey has no reserves of traditional energy sources. All the oil, coal, and natural gas needed must be brought into the state. This results in high costs for fuel, and also leaves New Jersey ratepayers at the mercy of forces outside the state which can affect the prices. Nuclear power has very low fuel costs, and to date, has helped stabilize electric rates in the state.

There are four nuclear power units in New Jersey. However, New Jersey utilities have part ownership shares in several nuclear power plants outside the state, which contribute a significant percentage of the nuclear-generated electricity consumed in New Jersey. Several out-of-state utilities also have shared in the financing of New Jersey nuclear units. Including all the ownership shares, New Jersey utilities own 5.25 nuclear units. This means that whatever retroactive premium is assessed per unit, for one year or for an unlimited time, total New Jersey utility responsibility will be 5.25 times that amount.

Any retroactive premiums on nuclear units will be assessed to the utilities that own these units. Currently, insurance expenses are considered a prudently incurred expense and a cost of operating a utility which is passed along to the ratepayers. It is not unreasonable to expect that in the case of a nuclear incident somewhere in the country, any retroactive premiums assessed to a utility in New Jersey would not be considered imprudently incurred and would be passed along to the ratepayers also. If the total premiums are passed through, rates would increase by the amount of the premiums.

This means that, given the goal of the lowest possible energy bills to consumers, the New Jersey Deaprtment of Energy is particularly interested in the effects of any revisions of the Price Anderson Act on electric rates in New Jersey. A nuclear incident in another state could conceivably have a significant impact on electric rates in New Jersey. The potential impacts will differ depending on how the Act is revised. Table 1 contains rough estimates of how a large (greater than $8 billion in claims) nuclear incident in some state other than New Jersey would affect the ratepayers of New Jersey, through the retroactive premiums, under the different revisions proposed by Senators Dole and Stafford, and Congressman Udall. These figures should be used for comparison and to indicate the approximate magnitude of the effects on ratepayers.

TABLE 1*

Comparison of Effects of One Large Nuclear Accident on Average Annual Residential Electric Bill

	Dole	Udall	Stafford
premimum	$10 M	$10 M	$10 M
Year 0 (before accident)	$653	$653	$653
Year 1 (accident)	659	659	659
Year 2	655 (1 mil assessment)	659	659
Year 3	654 ($500 M limit reached)	659	659
Year 4	653	659	659
Year 9	653	653	659

*Dole bill is S. 1225, Udall bill is HR 3653 and Stafford bill is S. 1761.

These calculations use 1985 electricity use and price figures from the 1985 New Jersey Annual Energy Profile. To make the comparison easier, inflation is assumed to be zero. The table uses the average electric bill for residential customers who do not use electric heat. The average electric bill for customers with electric heats would be just about double those in the table. These are average state figures; the effects would vary from utility to utility.

It is apparent from Table 1 that the effects of a $10 million retroactive premium on the ratepayers would be very small. This assessment would cause a rate increase of about 1 percent. At this level, the ratepayers could absorb the increase with little dislocation. State utilities are forecasting the costs of electricity to increase at or below the level of inflation through the end of the century. If this is truly the case, then even with an increase due to a nuclear incident, ratepayers will see more stable electricity rates than they have seen in many years.

The table shows that the effects of the Dole bill will be the most temporary, and therefore the least costly to the ratepayers. After the first year's retroactive premium of $10 million, a fee of 1 mil would be charged on every kilowatt-hour (kwh) of electricity generated at a nuclear unit. Given that in 1985, 384 billion kwh were generated at nuclear power plants throughout the country, it would take less than two years for the $500 million limit to liability to be reached.

Thus, four years after the accident, electric bills would return to their pre-accident levels. The remainder of the payments under this bill would come from the U.S. Treasury. The effects of the retroactive premiums in the Udall bill could last eight years after a large accident. For eight years, electric bills would be 1 percent higher than they would otherwise be. Any remaining compensation after eight years would again come from the Treasury.

Because the Stafford bill has no limit on liability, retroactive premiums could potentially be assessed for many years. It has a larger effect on the ratepayers than the Udall bill only if it takes more than eight years to compensate all the claims from an accident.

Currently, the customers of one New Jersey utility, Jersey Central Power and Light, are paying towards cleaning up a nuclear incident, Three Mile Island. Approximately $12.3 million annually is being passed through to Jersey Central ratepayers. This assessment represents about 1 mil per kwh sold by the company, or an increase of about 1 percent. The incident was not declared an Extraordinary Nuclear Event and so the Price Anderson Act was not invoked. No utilities other than the owners of the plant have had to make any retroactive payments toward the claims against the company. The company has received $306 million in insurance payments towards a total cleanup bill of about $985 million. The balance of the funds are being made up through other sources. The State of New Jersey is also paying almost $2 million annually towards the cleanup.

The citizens of New Jersey must be protected in the case of a nuclear incident. Persons who receive personal or property injury as a result of a nuclear incident have a right to just and timely compensation. An extraordinary nuclear event, though with only a small possiblity of occurring, has enormous potential losses, well beyond the scope of nuclear incidents up until now. The claims in such an incident could exceed the current limit to liability and any other limit set. If some victims are not compensated then they would be absorbing the cost of the accident themselves. In addition, latent injuries may be discovered many years later which should also be compensated. A limit to liability could conceivably leave little funding left for these claims in later years.

The State of New Jersey therefore recommends the maximum protection for potential victims of a nuclear incident. The assurance that our citizens would be justly compensated for injury and loss as a result of an accident is worth a very small potential rate increase until all claims are settled. Our goal is low energy bills, but it cannot be at the expense of a few. All the New Jersey ratepayers are receiving the benefits of low cost nuclear energy, and it is unfair to expect the portion of the population living near a nuclear unit to bear the potential costs without the guarantee of complete compensation. The victims cannot subsidize the ratepayers. The social cost of uncompensated victims is much higher than a 1 percent increase in rates.

All three bills being considered guarantee full compensation of victims, two ultimately through the federal government and one through premiums from the utilities, as decided by the courts. Thus, each satisfies our requirement of full compensation. It is also apparent that, even if all of the premiums are passed through to the ratepayers, none of the three is going to have a large effect on rates. The Dole bill would have the smallest effect and the Stafford the largest. Given goal of the New Jersey Department of Energy of low energy bills, we therefore recommend the alternative with the lowest direct effect on New Jersey ratepayers, the Dole bill.

STATE OF VERMONT
HOUSE OF REPRESENTATIVES
MONTPELIER
05602

NATURAL RESOURCES AND ENERGY COMMITTEE

Representatives:

Stephen Reynes
Chairman
Pomfret, 457-4081

Shirlee Arnold,
Vice Chairman
Whiting, 623-6261

Harry J. Pickering, Sr.
Arlington, 375-6430

Alice Cook Bassett
Burlington, 864-7964

Alice M. Emmons
Springfield, 885-5893

Lud Fortna
Warren, 583-2190

Michael A. Kimack
Wilmington, 464-8240

Mark MacDonald
Williamstown, 433-5867

Curt McCormack
Rutland City, 775-1163

Timothy J. Burke
Clerk
Putney, 387-4881

Donald Hooper
Brookfield, 276-3107

May 15, 1986

Mr. Dan Berkowitz
Senate Committee on Environment
and Public Works
Durksin Senate Office Building
Washington, D.C. 20510

Dear Committee Members,

I represent the Vermont House of Representatives on the National Conference of State Legislatures' (NCSL) Working Group on High Level Radioactive Waste, the Governor's Low Level Radioactive Waste Task Force and the Interstate(VT, NH, and Maine)Low Level Radioactive Waste Steering Committee.

The states involved in the D.O.E. repository siting and transportation process argue, and rightfully so, that there should be no limit on the accountability of those responsible in case of an accident.

In the wake of the Chernobyl tragedy it's clear that we should address a flaw in the Price Anderson Act--the cap on libility. For the exact reasons there should be no limit on liability for D.O.E. and D.O.E. contractor activities there should be no limit on ultimate liability for reactor accidents

I wholehartedly endorse the recommendations to Congress by the Nuclear Regulatory Commission (NRC). A cap on how much coverage we are requiring the industry to have is one thing, but to say that the industry is no longer responsible if damages exceed that cap is not the way to tell the public that they are relatively safe and that if they are damaged they will be compensated.

The NRC proposal if a $10 million annual liability cap, with no ultimate cap per reactor when an "extraordinary nuclear occurrence" is declared, is reasonable. It provides for compensation for victims (even if it takes a while) while not subjecting the industry to expenses they can't meet.

The Price Anderson Act is such an excellent insurance system it's a shame it has this flaw. The prospects for a number of improvements to Price Anderson look good during this Congress. I hope the cap on ultimate liability is removed as well.

Thank you very much.

Sincerely,

Curt McCormack

Rep. Curt McCormack
Rutland